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ALLAHABAD HIGH COURT

1919

Chief Justices :

The Hon'ble Sir Henry George Richards, Kt. K. C.

" " " Edward Grimwood Mears, Kt.

" " " George Edward Knox, Kt., I. S. O., I. C. S. (*Offg.*)

Puisne Judges :

The Hon'ble Sir George Edward Knox, Kt., I. S. O., I. C. S.

" " " Pramada Charan Banerji, Kt.

" " Mr. William Tudball, I. C. S.

" " " Muhammad Rafiq.

" " " Theodore Caro Piggott, I. C. S.

" " " Cecil Henry Walsh, K. C.

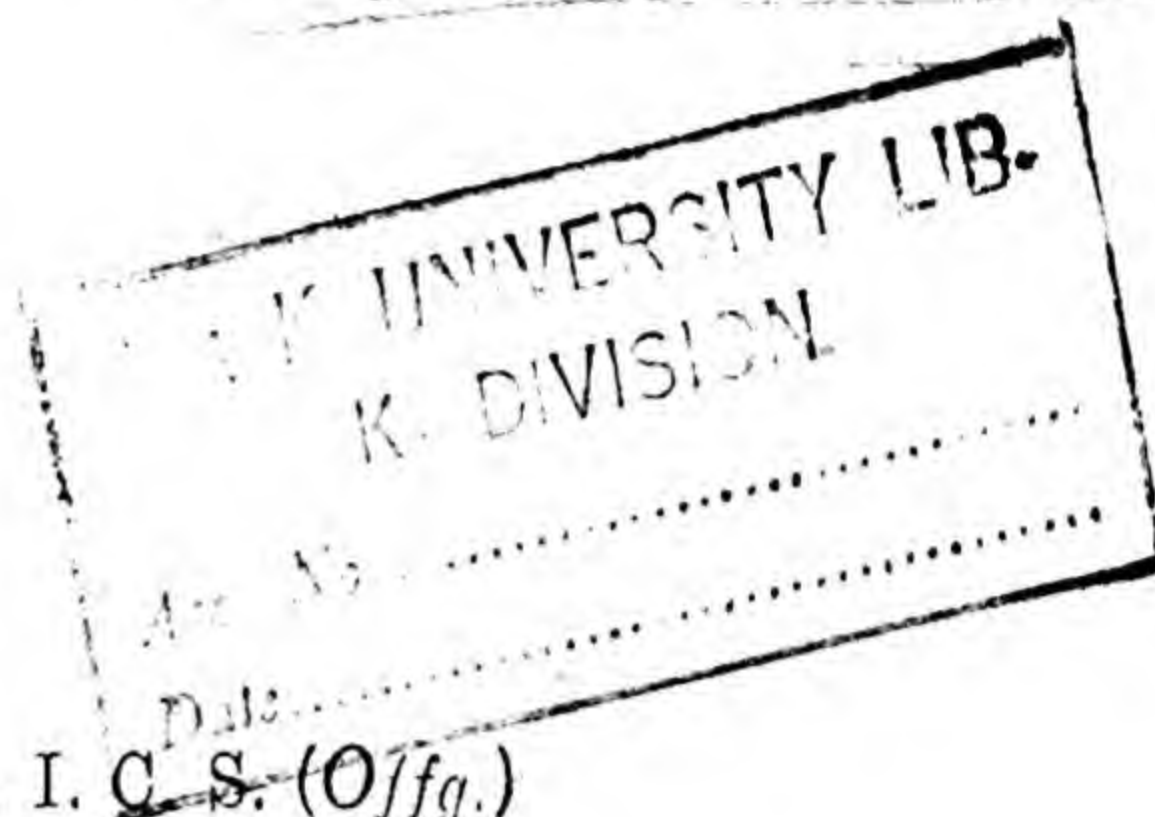
" " " Alfred Edward Ryves, (*Offg.*).

" " " Louis Stuart, C. I. E., I. C. S. (*Offg.*)

" " " Benjamin Lindsay, I. C. S. (*Offg.*).

" " " Barjor Jamshedji Dalal, I. C. S. (*Offg.*).

" " " William Wallach (*Offg.*).



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Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1919 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1919 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First and Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1919 with corresponding references of all the JOURNALS.

TABLE No. I.

Showing serially the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES for the year 1919, with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of I. L. R. 41 ALLAHABAD.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 41 Allahabad = All India Reporter.

ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.
1	1918 A	2	68	1918 A	24	182	1919 A	170	246	1919 A	263	311	1919 A	276	
22	1919 "	450	97	"	"	49	197	1918 "	1	248	"	"	62	316	"
28	1918 "	14	104	"	"	55	200	"	"	21	250	"	"	448	318
34	"	21	108	"	"	12	203	1919 "	190	254	"	"	214	322	"
37	"	23	111	"	"	61	207	"	"	140	259	"	"	331	324
40	"	20	116	"	"	56	211	"	"	60	270	"	"	267	329
42	"	11	125	"	"	38	217	"	"	308	272	"	"	188	338
45	"	49	130	"	"	40	219	1918 "	63	274	"	"	68	346	"
47	"	13	154	"	"	15	223	1919 "	112	278	"	"	182	350	"
51	"	9	157	1919 "	194	226	"	"	146	283	"	"	355	356	"
54	"	52	162	1918 "	16	231	"	"	220	286	"	"	432	361	"
60	"	60	164	"	"	17	235	"	"	324	294	"	"	427	366
63	"	118	169	1919 "	196	243	"	"	284	302	"	"	357	369	"

I. L. R. 41 Allahabad=All India Reporter—(Concl'd.)

ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.
372	1919 A 133	432	1919 A 337	503	1919 A 328	563	1919 PC 9	626	1919 A 272
378	" " 220	435	" " 200	503	" " 383	571	" " 12	629	" " 317
381	" " 337	443	" " 303	513	" " 350	573	" A 219	61	" " 275
384	" " 213	452	" " 370	515	" " 189	581	" " 226	635	" " 440
385	" " 261	454	" " 363	517	" " 193	583	" " 270	643	" " 102
390	" " 161	456	" " 105	521	" " 228	587	" " 258	646	" " 367
395	" " 279	473	" " 237	523	" " 238	592	" " 232	651	" " 205
399	" " 435	479	" " 300	526	" " 253	599	" " 184	654	" " 217
412	" " 162	481	" " 255	529	" " 415	602	" " 205	656	" " 208
417	" " 235	483	" " 160	534	" " 320	603	" " 268	658	" " 70
423	" " 283	486	" " 344	538	" " 123	611	" " 371	663	" " 252
426	" " 414	488	" " 410	553	" " 243	613	" " 240	666	" " 391
428	" " 303	492	" " 175	562	" " 230	623	" " 247	669	" " 403

TABLE No. II

Showing serialim the pages of other REPORTS, JOURNALS AND PERIODICALS for the year 1919 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

17 Allahabad Law Journal=All India Reporter

ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.
1	1913 PC 123	225	1919 A 313	426	1919 A 394	617	1919 A 253	841	1919 A 224
19	1913 A 196	229	" " 234	429	" " 400	620	" " 162	842	" " 208
32	" " 159	233	1913 PC 182	431	" " 356	625	" " 230	844	" " 367
34	1913 PC 97	239	1919 A 406	432	" " 260	629	" " 123	849	" " 252
44	" A 15	247	" " 62	434	" " 311	643	" " 210	853	" " 391
48	1919 " 200	249	" " 324	443	" " 331	646	" " 285	856	" " 70
52	" " 134	257	" " 400	445	" " 309	647	" " 226	861	" " 52
56	" " 185	236	" " 213	450	" " 370	649	" " 200	866	" " 389
60	" " 130	238	" " 307	452	" " 301	658	" " 270	867	" " 315
64	" " 188	239	" " 320	456	" " 366	662	" PC 162	868	" " 76
66	1913 PC 140	270	" " 63	458	" " 160	672	" A 223	872	" " 387
78	1913 A 182	273	1913 PC 143	461	" " 417	674	" " 247	873	" " 35
83	" " 60	273	1919 A 142	464	" " 337	677	" " 303	875	" " 447
89	" " 63	283	" " 231	467	" " 414	686	" " 184	878	" " 72
93	" " 74	290	" " 340	469	" " 235	687	" " 255	883	" " 26
97	" " 170	294	" " 427	474	" " 232	691	" " 280	888	" " 102
112	" " 140	302	" " 426	478	" " 376	694	" PC 150	891	" " 369
115	" " 207	306	" " 355	480	" " 255	700	" " 29	893	1920 " 358
117	" " 123	309	" " 265	481	" " 435	706	" A 415	896	" " 351
120	" " 112	313	" " 433	493	" " 260	711	" " 232	898	1919 " 46
123	" " 146	321	" " 357	496	" " 390	718	" " 205	901	1920 " 356
129	1913 PC 173	330	" " 227	493	" " 403	725	" PC 111	907	" " 353
141	1919 A 443	334	" " 300	500	" " 217	731	" A 275	910	1919 " 401
145	" " 302	335	" " 320	501	" " 228	734	" " 317	913	" " 80
146	" " 300	337	" " 333	503	" " 158	737	" " 302	916	1920 " 341
147	" " 220	343	" " 335	506	" " 419	738	" " 263	922	1919 " 238
151	" " 223	345	" " 396	510	" " 193	741	" " 105	925	" PC 31
153	1913 PC 156	347	" " 331	514	1913 PC 151	758	" " 160	945	" A 49
153	" " 140	352	" " 225	522	" " 192	760	" " 110	947	" " 6
165	1919 A 305	354	" " 125	533	1913 " 9	763	" " 242	950	1920 " 353
167	" " 302	357	" " 133	536	1913 " 196	765	" " 175	953	1919 " 211
169	" " 214	363	" " 261	552	1913 " 1	776	" " 388	957	" " 83
174	" " 212	369	" " 72	565	" A 344	783	" " 240	971	" " 32
177	" " 331	371	" " 397	567	" " 350	787	" " 274	973	" " 187
180	" " 267	374	" " 220	569	" " 320	789	" " 243	974	" " 90
191	" " 311	377	" " 337	574	" " 316	797	" " 272	976	" " 155
193	" " 303	381	" " 236	576	" " 199	800	" " 258	932	1920 " 310
195	" " 314	386	" " 164	590	" " 238	805	" " 440	935	1913 " 445
200	" " 307	391	" " 283	592	" " 297	814	" " 403	938	" " 123
202	1913 PC 130	394	" " 270	598	" " 383	820	" " 183	991	" " 339
207	" " 150	393	1913 PC 203	591	" PC 12	822	" " 371	933	" " 79
214	1919 A 276	405	" " 146	597	" " 17	830	" " 205	937	" PC 24
219	" " 233	410	1919 " 6	603	" " 11	832	" " 192	937	" " 39
223	" " 273	418	1913 " 138	614	" A 239	835	" " 217	1004	" " 39

17 Allahabad Law Journal=All India Reporter—(Concl'd)

ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.	ALJ	A. I. R.
1011	1919 PC 126	1031	1919 A 50	1053	1919 A 185	1068	1919 A 56	1127	1919 A 20
1015	" A 402	1034	" " 82	1054	" " 175	1072	1920 " 229	1138	" " 11
1018	" " 79	1036	" PC 75	1055	" " 44	1077	1919 PC 100	1140	" " 64
1021	" " 67	1047	" A 41	1057	" " 96	1093	" A 66	1146	" " 64
1025	" " 18	1050	" " 38	1061	" PC 42	1097	" PC 62	1147	" " 13
1039	" " 449	1052	" " 426			1117	" " 79		

20 Cr. L. J. & 49 to 53 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLES No. II in A. I. R. 1919 Lahore

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1919 ALLAHABAD, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1919 ALLAHABAD.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1919 Allahabad=Other Journals

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	42 All 230	17	54 I C 370	35	17 A L J 873	49 (2)	54 I C 418
	18 A L J 100	18	42 All 61		52 I C 63	50	42 All 76
	59 I C 20		17 A L J 1025		20 Cr L J 575		17 A L J 1031
6 (1)	42 All 200		52 I C 632	36	42 All 146		52 I C 644
	18 A L J 167	19	54 I C 411		18 A L J 61	51	54 I C 431
	54 I C 432		21 Cr L J 59		54 I C 402	52	42 All 1
6 (2)	42 All 50	20	42 All 98		21 Cr L J 50		17 A L J 861
	17 A L J 947		17 A L J 1127	38	42 All 86		52 I C 167
	58 I C 487		58 I C 600	FB	17 A L J 1050	55	42 All 195
7	42 All 187	23	42 All 222		52 I C 798		18 A L J 89
	18 A L J 73		18 A L J 214		20 Cr L J 718		54 I C 428
	54 I C 437		54 I C 381	40	54 I C 406	56	42 All 70
9 (1)	18 A L J 104	24	18 A L J 105		21 Cr L J 54		17 A L J 1068
	57 I C 10		55 I C 230	41	42 All 67		52 I C 684
9 (2)	54 I C 413	25	54 I C 384		17 A L J 1047	59	18 A L J 50
	21 Cr L J 61	26	42 All 12		52 I C 663		54 I C 408
19	42 All 142		17 A L J 883		20 Cr L J 695		21 Cr L J 56
	18 A L J 59		52 I C 418	43	54 I C 398	60	41 All 211
	58 I C 551		20 Cr L J 642	44	42 All 89		17 A L J 83
11	42 All 134	29	58 I C 681		17 A L J 1055		57 I C 346
	17 A L J 1138		21 Cr L J 809		52 I C 668	62	41 All 248
	54 I C 223	30	54 I C 387		20 Cr L J 700		17 A L J 247
12	42 All 169	31 (1)	42 All 202	45	42 All 181		56 I C 683
	18 A L J 70		18 A L J 96		18 A L J 162	63 (1)	42 All 136
	58 I C 546		55 I C 465		54 I C 395		18 A L J 58
13 (1)	18 A L J 87		21 Cr L J 305	46	42 All 26		54 I C 624
	51 I C 893	31 (2)	42 All 174		17 A L J 898		21 Cr L J 144
	21 Cr L J 189		18 A L J 83		52 I C 279	63 (2)	55 I C 31
13 (2)	42 All 125		54 I C 504		20 Cr L J 615	64 (1)	17 A L J 1146
FB	17 A L J 1147	32	42 All 36	48	42 All 191		54 I C 172
	52 I C 638		17 A L J 971		18 A L J 76		21 Cr L J 28
14	42 All 170		52 I C 191		54 I C 366	64 (2)	42 All 118
	18 A L J 142	34	42 All 176	49 (1)	42 All 48		17 A L J 1140
	54 I C 561		18 A L J 137		17 A L J 945		52 I C 742
15	55 I C 292		54 I C 528		52 I C 289	66	42 All 128
	21 Cr L J 276	35	42 All 22	49 (2)	18 A L J 71		17 A L J 1093

Comparative Tables

TABLE No. III

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A. I. R. 1919 Allahabad=Other Journals—(Concl'd.)

A.I.R. Other Journals				A.I.R. Other Journals				A.I.R. Other Journals				A.I.R. Other Journals			
66	53	I C	618	102	17	A L J	888	175 (1)	17	A L J	1054	217 (1)	17	A L J	500
	20	Cr L J	778		55	I C	45	175 (1)	52	I C	670		50	I C	667
67	42	All	79	104	54	I C	450		20	Cr L J	702		20	Cr L J	331
	17	A L J	1021	105	51	I C	133	175 (2)	41	All	492	217 (2)	41	All	654
	52	I C	642	FB	41	All	456		17	A L J	765		17	A L J	835
68	41	All	274		17	A L J	741		50	I C	938		51	I C	548
	17	A L J	89	110	50	I C	487	182	41	All	278	218	41	All	384
	57	I C	760		17	A L J	760		17	A L J	78		17	A L J	266
70	41	All	658		20	Cr L J	311		49	I C	256		49	I C	687
	17	A L J	856	112 (1)	49	I C	357	184	41	All	599	219	41	All	578
	54	I C	792		41	All	223		17	A L J	686		17	A L J	643
72 (1)	41	All	366		17	A L J	120		51	I C	201		50	I C	655
	17	A L J	368	112 (2)	51	I C	624		20	Cr L J	425	220	41	All	231
	54	I C	250		16	A L J	754	185 (1)	17	A L J	1053		17	A L J	147
	21	Cr L J	42	123	52	I C	690		52	I C	653		49	I C	654
72 (2)	42	All	7		17	A L J	988	185 (2)	17	A L J	56		20	Cr L J	206
	17	A L J	878	125	50	I C	494		49	I C	169	222 (1)	50	I C	648
	52	I C	331		17	A L J	354		20	Cr L J	137	222 (2)	51	I C	553
74	17	A L J	93		20	Cr L J	318	187	17	A L J	973	223 (1)	17	A L J	151
	57	I C	774	126	49	I C	353		52	I C	646		49	I C	620
76	42	All	18		17	A L J	117	188 (1)	41	All	272	223 (2)	17	A L J	672
	52	I C	263	128	51	I C	242		17	A L J	64		50	I C	646
	17	A L J	868		41	All	538		49	I C	165	224	17	A L J	841
78	54	I C	416		17	A L J	629		20	Cr L J	133		51	I C	576
	21	Cr L J	64	136	52	I C	657	188 (2)	17	A L J	820	225	41	All	369
79 (1)	42	All	130		20	Cr L J	689		51	I C	197		17	A L J	352
	17	A L J	1018	138	41	All	372		20	Cr L J	421		49	I C	591
	53	I C	702		17	A L J	357	189	41	All	515	226	41	All	581
	20	Cr L J	798		50	I C	375		17	A L J	576		17	A L J	647
79 (2)	42	All	64	140	41	All	207		50	I C	883		50	I C	640
	17	A L J	993		17	A L J	112	190	41	All	203	227	17	A L J	330
	52	I C	649		49	I C	367		17	A L J	60		51	I C	283
80	17	A L J	913	142	41	All	329		49	I C	118	228	41	All	521
	58	I C	552		17	A L J	278	192	17	A L J	832		17	A L J	501
82 (1)	54	I C	769		50	I C	398		51	I C	184		50	I C	780
	21	Cr L J	161	146	41	All	226	193	41	All	517	229	41	All	378
82 (2)	42	All	74		17	A L J	123		17	A L J	510		17	A L J	374
	52	I C	801		49	I C	362		50	I C	895		49	I C	590
	17	A L J	1034	148	40	All	238	194	41	All	157	231	17	A L J	288
83	58	I C	566		16	A L J	158		17	A L J	52		50	I C	777
	17	A L J	957		51	I C	638		49	I C	113	232	41	All	592
90 (1)	18	A L J	85	155	17	A L J	976	196	41	All	169		17	A L J	711
	54	I C	772		52	I C	785		17	A L J	19		51	I C	275
	21	Cr L J	164		20	Cr L J	705		52	I C	974	235	41	All	417
90 (2)	42	All	53	158	17	A L J	503	200	17	A L J	48		17	A L J	469
	17	A L J	974		50	I C	992		49	I C	111		49	I C	865
	20	Cr L J	710		20	Cr L J	384		20	Cr L J	127	238	41	All	523
	52	I C	790	159	17	A L J	32	202	50	I C	691		17	A L J	580
91	42	All	233		49	I C	98	203	49	I C	530		50	I C	814
SB	18	A L J	11		20	Cr L J	114	205	41	All	651	239	17	A L J	614
	55	I C	110	160 (1)	17	A L J	758		17	A L J	830		50	I C	833
	21	Cr L J	238		51	I C	208		51	I C	473		20	Cr L J	353
94	54	I C	117		20	Cr L J	432		20	Cr L J	489	240	41	All	619
95	42	All	204	160 (2)	41	All	483	206	50	I C	677		17	A L J	783
	18	A L J	93		17	A L J	458	207	17	A L J	115		51	I C	322
	55	I C	476		50	I C	989		49	I C	494	242	17	A L J	763
	21	Cr L J	316		20	Cr L J	381		20	Cr L J	174		51	I C	829
96 (1)	54	I C	120	162	41	All	412	208	41	All	656	243	41	All	553
96 (2)	42	All	83		17	A L J	620		17	A L J	842		17	A L J	789
	17	A L J	1057		49	I C	878		51	I C	539		50	I C	752
	52	I C	756	164	41	All	390	209	41	All	435	246	51	I C	815
97	54	I C	463		17	A L J	386		17	A L J	649	247	50	I C	748
98	42	All	185		51	I C	205		49	I C	990		41	All	623
	18	A L J	78		20	Cr L J	429	211	52	I C	362		17	A L J	674
	54	I C	443	167	50	I C	978		17	A L J	953	248	51	I C	856
99	18	A L J	99		20	Cr L J	370	212	17	A L J	174	249	40	All	221
	55	I C	35	170	41	All	182		49	I C	721		16	A L J	153
100	42	All	207		17	A L J	97	213	52	I C	688		49	I C	103
	18	A L J	180		49	I C	306	214	41	All	254		20	Cr L J	119
	54	I C	459	174	52	I C	672		17	A L J	169	252	41	All	663
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	50 I C	772	51 I C	73	327 52 I C	49	20 Cr L J
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	17 A L J	480	50 I C	744	328 52 I C	32	20 Cr L J
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	51 I C	65	17 A L J	718	51 I C	470	20 Cr L J
257	41 All	587	51 I C	331	20 Cr L J	486	376 (2) 17 A L J
258	17 A L J	800	297 41 All	473	330 53 I C	617	50 I C
	50 I C	827	17 A L J	582	20 Cr L J	777	20 Cr L J
	20 Cr L J	347	50 I C	730	331 (1) 17 A L J	443	377 52 I C
260	17 A L J	432	300 (1) 17 A L J	334	50 I C	79	378 51 I C
	51 I C	161	51 I C	351	331 (2) 41 All	259	379 16 A L J
	20 Cr L J	401	20 Cr L J	463	17 A L J	177	51 I C
261	41 All	385	300 (2) 17 A L J	146	49 I C	737	20 Cr L J
	17 A L J	363	49 I C	781	335 52 I C	628	381 41 All
	49 I C	543	20 Cr L J	221	337 41 All	482	17 A L J
262	51 I C	15	301 17 A L J	452	17 A L J	464	50 I C
263	41 All	246	50 I C	48	50 I C	115	383 41 All
	17 A L J	270	302 (1) 17 A L J	145	338 41 All	350	17 A L J
	50 I C	87	49 I C	778	17 A L J	337	50 I C
	51 I C	55	20 Cr L J	218	50 I C	372	385 17 A L J
264	41 All	324	302 (2) 17 A L J	737	339 17 A L J	991	50 I C
265	17 A L J	309	51 I C	865	52 I C	161	20 Cr L J
	50 I C	948	303 41 All	443	340 17 A L J	290	386 52 I C
	41 All	270	17 A L J	677	50 I C	126	20 Cr L J
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	49 I C	732	307 (1) 17 A L J	200	343 52 I C	640	51 I C
268	41 All	609	49 I C	776	344 41 All	486	387 (2) 17 A L J
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	51 I C	107	20 Cr L J	410	20 Cr L J	368	393 52 I C
276	41 All	311	314 41 All	318	357 41 All	302	20 Cr L J
	17 A L J	214	17 A L J	195	17 A L J	321	394 17 A L J
	49 I C	855	49 I C	747	51 I C	337	50 I C
	20 Cr L J	231	315 17 A L J	867	20 Cr L J	449	20 Cr L J
279	41 All	395	51 I C	163	360 16 A L J	669	395 41 All
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	17 A L J	625	20 Cr L J	268	50 I C	161	396 (1) 53 I C
	50 I C	740	317 41 All	629	20 Cr L J	273	20 Cr L J
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	49 I C	816	320 41 All	534	20 Cr L J	572	398 53 I C
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401	17 <i>A L J</i> 910	413 (2)53	<i>I C</i> 624	426 (2)17	<i>A L J</i> 1052	447 (1)17	<i>A L J</i> 875
	52 <i>I C</i> 229	20	<i>Cr L J</i> 784	52	<i>I C</i> 901	95	<i>I C</i> 405
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	52 <i>I C</i> 655	415	41 <i>All</i> 529	430	52 <i>I C</i> 52		52 <i>I C</i> 830
403 (1)17	<i>A L J</i> 498		17 <i>A L J</i> 706		20 <i>Cr L J</i> 564	449	17 <i>A L J</i> 1028
	50 <i>I C</i> 152		51 <i>I C</i> 119	433	41 <i>All</i> 286		70 <i>I C</i> 444
403 (2)41	<i>All</i> 669	417	17 <i>A L J</i> 461		17 <i>A L J</i> 313	450	41 <i>All</i> 22
	17 <i>A L J</i> 814		50 <i>I C</i> 90		50 <i>I C</i> 953		16 <i>A L J</i> 871
	52 <i>I C</i> 366	419	41 <i>All</i> 488	435	41 <i>All</i> 399		48 <i>I C</i> 200
406	41 <i>All</i> 338		17 <i>A L J</i> 506		17 <i>A L J</i> 481	453	40 <i>All</i> 558
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S. N. DAVAR, P. L. D.,
Vakil High Court.

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ALLAHABAD HIGH COURT

A. I. R. 1919 Allahabad 1

MEARS, C. J. AND BANERJI, J.

Bhagwan Baksh Singh—Defendant—
Appellant.

v.

Damodarji Joshi and others—Plaintiffs
—Respondents.

First Appeal No. 320 of 1917, Decided
on 20th December 1919, from decree of
Sub-Judge, Benares.

**(a) Accounts—Settled — Substantial error
or fraud but not fiduciary relationship is
ground to reopen—What does not amount
to undue influence stated—When entries of
compound interest are not objected to agree-
ment to pay it may be inferred—Interest.**

Settled accounts between two parties may be
reopened on the ground of substantial error or
fraud; the existence of a fiduciary relation be-
tween the parties is not necessary. [P 2 C 2]

It is open to a creditor to ask his debtor to
execute documents in a particular form, and the
fact that a creditor writes to his debtor's ser-
vant to obtain his master's signature to that form
does not raise the inference that undue influence
was to be used. [P 4 C 1]

Where accounts contain clear and specific
entries of compound interest, and they are
accepted by the debtor without any objection on
his part, it is a reasonable inference that he has
agreed to pay compound interest. [P 4 C 2]

**(b) Civil P. C. (1908), S. 34—Interest to be
awarded after suit—When amount charged
and claimed exceeds one-third of principal,
interest after suit may be refused.**

The award of interest after institution of a suit
is within the discretion of the Court, and where
throughout the whole period of the dealings
between the parties, compound interest has been
charged and the total amount of such interest ex-
ceeds one-third of the amount of the claim, a
Court would be justified in refusing future in-
terest. [P 5 C 2]

*Motilal Nehru, T. B. Sapru and Ja-
wahir Lal Nehru*—for Appellant.

B. E. O'Connor—for Respondents.

Judgment.—This appeal arises out of
a suit for recovery of Rs. 3,50,000, prin-
cipal, and Rs. 58,746-1-6, interest; in all,

Rs. 4,08,746 on the basis of a promissory
note executed by the appellant on 9th
November 1910.

The plaintiffs are a firm of jewellers
and money-lenders of Benares, who carry
on considerable business. The defendant-
appellant is the Raja of Amethi and a
talukdar of Oudh. In 1904, a suit was
pending against him in regard to his
estate and for the expenses of that suit
he was in need of money. He was ap-
proached by the plaintiff's firm and deal-
ings began with him. Large sums of
money were advanced to him from time
to time and he also purchased jewelry of
considerable value from the plaintiffs. It
is alleged, and not denied, that he re-
ceived from the plaintiffs nearly three
lacs of rupees in cash, and it is stated that
jewelry of the value of nearly Rs. 90,000
was supplied to him. Accounts were sub-
mitted to him from time to time and he
signed them and, on two previous occa-
sions, executed promissory notes for the
amounts shown by the account to be due.
The final promissory note is that of 9th
November 1910, for the principal sum of
Rs. 3,50,000. The rate of interest men-
tioned in the note is 8 annas per cent per
mensem, that is, 6 per cent per annum,
simple interest. The plaintiffs however
state that the rate orally agreed upon
was compound interest at the same rate
with monthly rests, and interest has been
claimed at that rate. Credit has, of
course, been given for payments made by
the defendant.

The defendant-appellant, whilst ad-
mitting execution of the promissory note,
asserted that plaintiff 1, Damodarji Joshi,
had ingratiated himself into the favour of
the defendant and acquired great influence

over him; that in collusion with the defendant's servants he fraudulently caused the defendant to sign accounts and execute promissory notes; that it was understood between the parties that accounts would be explained and adjusted when final payment would be made; that this had not been done, and that the full amount of the last promissory note was not due to the plaintiffs. He urged that the accounts should be reopened and fresh accounts taken of the dealings between the parties. He objected to the charging of compound interest, to the claiming of interest on the price of the jewelry sold to him, to the price of the jewelry and, in particular, to that of a blue diamond, and in substance he contended, that he had been overcharged to the extent of about Rs. 50,000.

The Court below has decreed the claim in part. The learned Subordinate Judge refused to reopen the accounts on the ground that a settled account could only be reopened where a fiduciary relation existed between the parties, and no such relation existed in the present case. As to the blue diamond, he held that plaintiff 1 was the agent of the defendant for the purchase of it and that he could only charge the price actually paid for it to the seller. The learned Judge therefore disallowed Rs. 10,100 the amount of difference between the price charged and the amount paid. As to other articles of jewelry, he held that it had not been established that any excessive charge was made. He further held that the plaintiffs had wrongfully detained certain bars of gold which they had taken from the defendant and pawned with the Allahabad Bank, and the defendant was entitled to interest on the value of the gold bars. He accordingly deducted from the claim the amount of such interest. He also was of opinion that the plaintiffs were entitled to obtain simple interest on the amount of the promissory note for Rs. 3,50,000 and not compound interest as claimed; and he did not allow further interest for the period subsequent to the institution of the suit. The total amount for which a decree was passed was Rs. 3,51,255-9-3. The defendant has preferred this appeal and the plaintiffs have filed cross-objections in regard to the order of the Court below as to the gold bars and the interest for the period of the pendency of the suit and future interest.

It is contended on behalf of the appellant that it has been proved that he provisionally signed the promissory note on the understanding that full and true accounts would be rendered at the time of the final closing of the account, and it was strenuously urged that in any case the appellant was entitled to have the accounts reopened.

The view of the learned Subordinate Judge that settled accounts can be reopened only where a fiduciary relation exists is, in our opinion, incorrect. Settled accounts may be reopened on the ground of substantial error or fraud. This was held in *Williamson v. Barbour* (1), where the law on the subject was thus laid down, by Jessell, M. R.:

"If they (the errors) are sufficient in number and importance, whether they are errors caused by mistake, or errors caused by fraud, the Court has a right to open the accounts . . . But . . . when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party, that is, the trustee or agent, is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position, that is to say, that a less amount of error will justify the Court in opening the account."

His Lordship added that "every case must depend on its own circumstances." The same view was held by the Privy Council in *McKellar v. Wallace* (2). In the present case it is clear that there was no fiduciary relation and it has not been established that fraud was perpetrated. We have therefore to consider whether

"the accounts have been shown to be erroneous to a considerable extent both in amount and the number of items."

As we have already said, it is admitted that large sums of the money were advanced to the appellant in cash. It is further admitted by the appellant that he received twelve articles of jewelry from the plaintiff which are still in his possession and have been used by him or by members of his family. As regards these articles, exception has been taken chiefly in regard to the blue diamond. In respect of the other articles it was stated generally that the price had been overcharged. An attempt was made to support this allegation by the evidence of a jeweller but this evidence is far from satis-

(1) [1878] 9 Ch. D. 529=50 L. J. Ch. 147=37 L. T. 698.

(2) [1851-54] 5 M. L. A. 372=8 Moo. P.C. 378=1 E. R. 309=1 Sar. 453=18 E. R. 936=14 E. R. 141=97 R. R. 62 (P.C.)

factory. As we shall point out hereafter, the accounts submitted to the appellant from time to time as to the detailed value of these articles which were accepted without demur and as to which at no time during the whole course of the dealings between the parties was any objection raised. As for the blue diamond the Court below has reduced the price charged for it by Rs. 10,100. The ground on which it has done so, namely, that the plaintiffs were the agents of the defendant in the matter of the purchase of the blue diamond does not commend itself to us. The fact however remains that the account has been reopened as to the price of the blue diamond and the plaintiffs have submitted to the order of the Court below in the matter and have taken no exception to it. It is not therefore necessary for us to enter further into the question of the price of the blue diamond. As to the other jewels there is no satisfactory reason for reopening the account.

The remainder of the account between the parties consists of: (1) moneys paid in cash to or on account of the appellant; (2) sums expended by the plaintiff in connexion with a garden house of the appellant in Benares, and (3) interest on the moneys advanced as well as on the price of jewelry which remained unpaid. As we have mentioned above there is no dispute in regard to the first item. It has not been denied that all the sums entered in the accounts were paid either to the appellant in cash or to his creditors such as the Benares Bank. The correctness of items of the second description has not been challenged, and the items have also been proved. The total of these items is moreover comparatively small. It is the item of interest which is said to have been erroneously charged in the accounts and it is this item to which almost the whole of the argument addressed to us on behalf of the appellant was directed.

The plaintiffs have in their accounts charged compound interest with three-monthly rests. The defendant-appellant, denies that he ever agreed to pay compound interest and it is the charging of compound interest to which he objects and which is alleged to be a serious error in the accounts. There is no direct evidence save the statement of plaintiff 1, Damodarji, that an agreement was entered into for the payment of compound interest. The statement of Damodarji on

the point seems to be hearsay but we find that ever since the commencement of dealings between the parties on 20th November 1904, compound interest has been charged in the accounts. These accounts are printed on p. 82 and subsequent page of the respondent's book. It appears that since that date accounts were made out and submitted to the defendant. In the years 1904 and 1905 promissory notes appear to have been taken from the defendant on each occasion when money was borrowed by him in cash from the plaintiffs, but when the dealings were extended and mutual confidence was established the practice of taking promissory notes seems to have been discontinued. We find that in 1907, when partition took place between the several members of the plaintiff's firm an account was prepared of the amount due to the firm by the defendant. This account which is printed on p. 82 of the respondent's book, showed a balance of Rs. 1,14,672-7-9 as due by the defendant and was signed by him. Chhunu Lal who made the partition added further interest and declared the total sum due up to 31st August 1907, and allotted it to the share of the plaintiffs.

Not only was the account signed in recognition of its being correct, but on 24th November 1907 a promissory note was executed by the defendant for the total amount due up to the aforesaid date, including compound interest. In this promissory note reference was made to the accounts of the plaintiffs. In accounts for subsequent years compound interest was charged every quarter till on 25th October 1908, a balance was struck and signed by the defendant admitting Rs. 2,02,884-1-2 to be due; for this amount he executed a promissory note on 19th May 1909. After this date also dealings continued between the parties and on 9th November 1910, the promissory note for Rs. 3,50,000, which is the foundation for the suit, was executed. It recites that the account of the note was admitted to be due. In the accounts for the whole of this period compound interest was charged and there was no concealment or misrepresentation of any sort. The defendant asserts that the accounts were never explained to him and that he signed such papers and documents as he was asked to sign. It is said on his behalf that he was entirely under the in-

fluence of his servants, Muhammad Amin and Ragho Ram, that these men were bribed by the plaintiffs and that they obtained the defendant's signatures on accounts and other papers. The evidence on the record does not satisfy us that these men had such influence over the defendant that they could induce him blindly to sign accounts admitting liability for large sums of money and execute promissory notes for these sums. The defendant is the owner of a large estate and is apparently a man of affairs. He had managers, some of whom were Europeans, to look after his estate and his pecuniary dealings. It is not therefore likely that he did not satisfy himself as to the general correctness of the accounts. As we have said above, compound interest was charged every quarter and nothing was concealed. Many of the amounts paid by the defendant were credited towards interest.

We do not think it probable that all these entries escaped the attention of the defendant or that they were withheld from him or that he was deceived in any way as regards those entries. It has not been proved to our satisfaction that Muhammad Amin and Ragho Ram were bribed. The only evidence to which our attention has been called consists of letters from which it appears that on one occasion a small sum of money was paid to Muhammad Amin and Damodarji offered to pay the expenses of his medical treatment when he was ill. This evidence is hardly sufficient to prove bribery. Another circumstance referred to on behalf of the appellant is that the plaintiff Damodarji wrote a letter to Ragho Ram in which he told him that the accounts should be signed and a promissory note drawn up in a particular form. It is not unusual for a creditor to ask his debtor to execute document in a particular form but his writing to the debtor's servants to ask his master to sign in that form does not raise the inference that undue influence was to be used. Muhammad Amin and Ragho Ram have not been examined as witnesses, although they appear to have made over to their master some of the letters written to them by Damodarji, plaintiff, and they have not ventured to depose before the Court that they never explained accounts to their master and that he did not understand the accounts when he signed them and

executed promissory notes. Under these circumstances we are unable to hold that the appellant was ignorant of the contents of the accounts signed by him. As these accounts contained clear and specific entries of compound interest and they were accepted by the defendant without any objection on his part, he acquiesced in the charging of compound interest and the inference is not unreasonable that he had agreed to pay compound interest. In coming to this conclusion we have not overlooked the fact that in none of the early promissory notes executed by the defendant there is any mention of compound interest; but for the reasons stated above we think it is now too late for the defendant to repudiate the inclusion of compound interest in the accounts and to urge that the accounts are erroneous. The Court below was in our opinion right in refusing to re-open the account which was adjusted by the execution of the promissory note on which the claim is based.

The contention put forward on behalf of the appellant that it was agreed at the time of the execution of the promissory note in suit that the accounts would be explained and adjusted when payment would be finally made is, in our judgment, without force and it has not been established that such an agreement was entered into by the parties. It is true that Mr. McGregor, the manager of the defendant, wrote to the plaintiffs on 9th April 1913, for detailed account of their dealings with the Raja, but he said that he wanted this because Muhammad Amin had not got all the papers, thereby implying that he had some of the papers. He repeated the request on 7th June 1913 (see R. 40 and R. 41). On 1st July 1913 however he wrote to the plaintiffs as follows:

"I have seen your banking account with the Raja Sahab of Amethi and find that since the pro-note handed to you by the Raja Sahab for Rs. 3,50,000 on 9th November 1910, a further sum of Rs. 47,241-13-0 has accrued on interest, making up a total due to you of Rs. 3,97,241-13-0. I am arranging that, in the end of September 1913, if your amount is not paid off in full, a mortgage bond will be executed including interest up to the date of its execution."

This letter, which is printed on p. 42 of the respondent's book, shows not only that the manager had seen the plaintiff's accounts, but also that the amount of the promissory note in suit, together with subsequent interest, was due and that arrangements would be made for its pay-

ment. A letter in such unequivocal terms is inconsistent with the theory of a future adjustment of accounts.

A suggestion was finally made to the effect that the promissory note in question was not executed on the date it bears but on a later date. There is, in our judgment, no foundation for this suggestion. The plaintiffs had nothing to gain by antedating the document.

For the above reasons, we are of opinion that the defendant's appeal is without force and must be dismissed.

We have now to consider the objections raised on behalf of the plaintiffs-respondents.

The first objection relates to some bars of gold which the plaintiffs admittedly took from the defendant and did not return for a long time. The plaintiffs have stated in the plaint that the gold was given to them as security for the money due to them and this statement has been repeated by Damodarji in his deposition. The defendant, on the other hand, asserts that the bars of gold were taken from him by Damodarji for the purpose of raising money to enable him to purchase a pearl necklace. The gold bars were handed over to Damodarji on 18th July 1910, and it has been proved by incontrovertible evidence that he pawned them with the Benares Branch of the Allahabad Bank three days afterwards as security for a loan of Rs. 2,04,000 and they remained in the custody of the Bank till 13th October 1913, although the debt had been discharged in the previous month of December. The statement of Damodarji that the gold had been given to him as security for the money due to him is clearly untrue. In the receipt which he gave for the gold on 18th July 1910 (p. 114-A) there is no mention of security at all and the letter which he wrote to the defendant on 19th July 1910 (p. 97-A) clearly negatives the allegation of security. In that letter he stated that the deposit (i. e., the gold) would be detained for two or three months and clearly implied that it would be given back after that period. In a subsequent letter, dated 10th December 1910, (p. 97-A), referring to a demand for the gold, he said that it was of no use to him and added: "As it was kept with you so it is kept with me." He also said that he was making arrangements about it. It will

be remembered that all this time the gold was pledged with the Allahabad Bank for the money borrowed from it by Damodarji, so that Damodarji was making an untrue representation in this letter. The statement he made in his deposition as to the date of the return of the gold was also clearly untrue. We are satisfied, in agreement with the Court below, that the gold was not given to the plaintiffs by way of security. The defendant has sworn that he asked for the return of the gold through Muhammad Amin. This is corroborated by the admission of Damodarji, as contained in the letter of 10th December 1910, to which we have referred above. It is thus manifest that the gold, which was of large value, was wrongfully detained for upwards of three years in spite of demands for its return. The Court below was therefore justified in allowing compensation to the defendant for the wrongful detention of his gold and we think that the amount of compensation was properly and reasonably assessed. In our judgment the objection of the plaintiffs in regard to the gold and the defendant's plea that the compensation awarded is inadequate are both untenable.

The next objection advanced on behalf of the respondents is that the Court below has improperly refused to award interest to them for the period of the pendency of the suit as also future interest. As we have already stated, the learned Subordinate Judge awarded simple interest only on the amount of the promissory note in suit and not compound interest as claimed. This he did up to the date of the institution of the suit. The plaintiffs have taken no exception to this award of interest, but they urged that further interest for the period subsequent to the date of the suit ought to have been awarded. The reason assigned by the Court below for its action may be open to criticism. But a Court has a discretion to the award of interest after the institution of a suit of this description. Having regard to the fact that throughout the whole period of the dealing between the parties compound interest has been charged and the total amount of such interest exceeds a lac of rupees the Court below was, in our opinion, justified in declining to award further interest. We therefore disallow the respondents' objection as to further interest.

We think that, although the appeal has failed, the respondents should not be allowed costs of the appeal as a mark of our disapprobation of the conduct of the principal plaintiff in making numerous statements in this case which we cannot help thinking were, to say the least of them, untrue statements. We accordingly dismiss the appeal and overrule the respondent's objections and direct the parties to bear their own costs in this Court.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 6 (1)

TUDBALL AND RIVES, JJ.

Amba Prasad—Defendant—Appellant.

v.

Mushtaq Husain—Plaintiff—Respondent.

First Appeal No. 46 of 1919, Decided on 27th November 1919, from order of Sub-Judge, Moradabad, D/ 9th December 1919.

Civil P. C. (5 of 1908), S. 102 and O. 41, R. 23—Order of remand in small cause nature suit below Rs. 500 is not appealable.

There is no second appeal in a suit of a small cause nature of value below Rs. 500. An order of remand therefore in such a suit is not open to appeal. [P 6 C 2]

S. Raza Ali—for Appellant.

S. M. Sulaiman—for Respondent.

Judgment.—A preliminary objection is raised in this appeal that no second appeal lies. The facts are briefly as follows: The plaintiff-respondent and the defendant-appellant, with effect from 1st July 1914, that is the beginning of the year 1322 Fasli, were owners of two separate mahals in a village after a perfect partition had been effected. In the year 1322 Fasli the revenue of both these mahals fell into arrears. The plaintiff was forced to pay the revenue not only of his own mahal, but also of the defendant's mahal to the extent of Rs. 127. He brought the present suit to recover their sum plus interest from the defendant in the Court of the Munsif.

The Munsif dismissed the suit on the ground that no suit lay to recover the amount. The plaintiff appealed. The lower appellate Court came to the opposite conclusion and remanded the suit for decision on the merits to the first Court. The defendant has come up here on appeal from this order of remand. Under O. 43, R. 1, Cl. (4), an order under R. 23 O. 41, remanding a case is appealable

where an appeal would lie from the decree of the appellate Court. It is contended and with force that in the present suit no second appeal would have lain from the decision of the appellate Court because the suit is one of a small cause nature, the sum to be recovered being below Rs. 500. On behalf of the plaintiff it is urged that Art. 39 or Art. 40, Sch. 2, Small Cause Courts Act, would cover the suit. But with this we cannot possibly agree. The plaintiff did not pay the money in a representative capacity on behalf of the defendant, therefore Art. 39 cannot apply. Art. 40 refers to a suit for profits and does not apply. Art. 41 refers to a suit by a sharer in joint property, which is not the case here. It is clear that if any suit can lie, it does not fall under any of these articles and is really a suit of a Small Cause Court nature being for a sum below Rs. 500. Therefore no second appeal would have lain from a decree of the appellate Court and no appeal therefore lies from the order of remand. There are decisions on the point in the case of *Nath Prasad v. Baij Nath* (1) and the case of *Qutub Husain v. Abdul Hasan* (2). The decision in the case of *Tulsa Kunwar v. Jageshar Prasad* (3) contains remarks which apply to the facts of this case. We have been asked to treat this case as a revision, but in view of the fact that the money was admittedly paid and has not been refunded we decline to do so. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1881] 3 All. 66.

(2) [1882] 4 All. 134=(1881) A. W. N. 141.

(3) [1906] 28 All. 563=3 A. L. J. 372=(1906) A. W. N. 114.

A. I. R. 1919 Allahabad 6 (2)

BANERJI AND WALLACH, JJ.

Durga Prasad—Plaintiff—Appellant.

v.

Bhajan and others—Defendants—Respondents.

Second Appeal No. 902 of 1917, Decided on 15th July 1919, from decision of Dist. Judge, Jhansi, D/- 26th May 1917.

Hindu Law—Alienation—Father—Mortgage by—Purchaser of property suing for redemption—Mortgagee cannot challenge sale on ground of absence of legal necessity.

B, the father of a joint Hindu family, mortgaged the family property to *J*. On *B*'s death his son *R* became the head of the family and executed a sale deed of the mortgaged property in favour of *D*, who, by virtue of the sale, brought the present suit for redemption impleading the

sons of the mortgagee—the mortgagee having died—and R as defendants. The mortgagees contested the suit on the ground of want of legal necessity for the sale :

Held : that the suit must succeed as it was not open to the mortgagees to advance as a defence the plea of absence of legal necessity. [P 7 C 1]

J. M. Benerji—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit for redemption of a mortgage made by one Baiju in favour of Jaman, the father of defendants 1 and 2. Baiju is dead. He left two sons Ram Din and Phunki. Phunki died leaving sons who together with Ram Din have been found to be members of a joint family. Ram Din is the head of that family. He executed a sale deed of the mortgaged property in favour of the plaintiff, and by virtue of this sale deed the plaintiff has instituted the present suit for redemption. The defendants are: (1) the sons of the mortgagee, and (2) Ram Din, the plaintiff's vendor. The Court of first instance dismissed the suit on the ground that it had not been proved that there was legal necessity for the sale made by Ram Din. This decision has been affirmed by the lower appellate Court. In our opinion the Courts below have erred in dismissing the suit upon the ground mentioned above. Ram Din is the head of the family and apparently executed the sale deed in favour of the plaintiff in that capacity. He represents the joint family which has been found to consist of himself and his nephews. No question as to his authority to transfer the property arises in this case as between mortgagees and the plaintiff. That is a question between him and his co-sharers. He has executed the sale deed in the plaintiff's favour and that is not denied. He being the head of the family was competent to execute the sale, but whether as between him and his nephews the sale would be a valid and binding sale is not a question which arises in the present suit. The defendants mortgagees are not entitled to put it forward as an answer to the claim. In our opinion the suit ought to have been tried upon the merits. The rulings to which the Courts below have referred do not seem to us to have any bearing on the present case. There is no question of nonjoinder of parties as Ram Din is the head of the joint family and represents that family and the members thereof. We allow

the appeal, set aside the decrees of the Courts below and remand the case to the Court of first instance with directions to re-admit the suit upon its original number in the register and try it on the merits. Costs here and hitherto will be costs in the cause and the costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 7

LINDSAY, J.

Bishun Padu Haldar — Defendant—Appellant.

v.

Chandi Prasad & Co.—Plaintiffs—Respondents.

Civil Revn. No. 37 of 1919, Decided on 24th November 1919, against order of Small Cause Court Judge, Moradabad, D/- 26th November 1918.

Contract Act (9 of 1872), S. 7—Though acceptance may not be communicated silence on proposal does not necessarily mean acceptance — Crediting money to buyer's account sent with offer of purchase amounts to acceptance.

The acceptance of a proposal must be absolute and unqualified and a person making a proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it; but an acceptance may be made without express communication. [P 8 C 2]

A written proposal for the purchase of goods, accompanied by a sum of money as the price thereof conveyed by a purchaser to the seller and received by the latter, who credits the money so received to his account, amounts to a definite acceptance of the proposal and renders the seller liable in an action for damages in case of his failure to carry out the contract. [P 8 C 2]

U. S. Bajpai—for Appellant.

R. K. Malvy—for Respondents.

Judgment.—A suit was brought by the plaintiffs, a firm of chemists in Moradabad, against the defendants, also a firm of chemists, carrying on a business in Benares. The amount in dispute was Rs. 61-10-0 and this sum was claimed by the plaintiffs on account of an alleged breach of contract. The main defence to the suit was that there was no contract between the parties. The lower Court found in favour of the plaintiffs and decreed the claim. There were several other points debated in the Court below but here I am concerned only with the question whether or not there was a binding contract between the parties.

The facts may be briefly stated as follows: On 7th February 1918 the plaintiffs wrote to the defendants inquiring the price at which they could supply cocaine. The defendants replied on 13th February 1918 informing the plaintiffs that the rate for cocaine was Rs. 20 per ounce "without engagement." The meaning of this latter expression is that as the market rate of cocaine was varying from day to day, the defendants were unable to quote any definite rate for the article.

On 14th February the plaintiffs sent to the defendants a money order for Rupees 17-8-0. On the coupon attached to the money order the plaintiffs wrote and asked that the defendants should set aside for them a certain amount of cocaine, the price of which was represented by Rupees 17-8-0. It is admitted that the price was calculated to the quotation of Rs. 20 per ounce which had been given by the defendants. It is proved that the money sent by this money order was received by the defendants on 16th February 1918; an acknowledgment of the receipt reached the plaintiffs in due course. It was stated at the time the order was given that the plaintiffs were applying to the Collector of Moradabad for a permit to import the cocaine and the defendants were asked to delay the sending of the parcel until the permit had been obtained.

On 23rd February the plaintiffs sent the permit which they obtained from the Collector. On 4th March 1918 the defendants intimated to the plaintiffs that they were unable to supply cocaine at Rs. 20 per ounce. They intimated that the price had risen and asked the plaintiffs what they were prepared to do. The plaintiffs apparently took up the position that there was a contract for the supply of the article at Rs. 20 per ounce and they wrote accordingly. Later on the defendants returned the money to the plaintiffs, who refused to receive it; the result has been this suit for breach of contract, the damages claimed being on the difference between the alleged contract rate and the market price of the day.

As I have already said, the Judge of the Court below took the view that there was a binding contract between the parties. He treated the order of the plaintiffs, which was sent to the defendants on 14th February 1918, as a proposal and was of opinion that that proposal had been accepted by the defendants by their con-

duct. The learned Judge pointed out that the defendants had accepted the money and had kept silent for a considerable period. In his judgment therefore the defendants had bound themselves by their conduct and their refusal to deliver the cocaine at the rate quoted in their first letter amounted to a breach of contract.

The argument here is that there was no acceptance of the plaintiffs' offer. It was said that the mere neglect of the defendants to give a speedy answer to the communication sent by the plaintiffs on 14th February 1918 could not have the result of placing the defendants under a legal obligation. If there had been nothing more in the case than the communication of a proposal by the plaintiffs followed by silence on the part of the defendants, this argument would have been sound enough. On this point I may refer to a judgment of the Bombay High Court, *Haji Mahomed Haji Jiva v. E. Spinner* (1). At p. 524 of the report Jenkins, C. J., observes:

"I take it to be clear that a person making a proposal cannot impose on the party to whom it is addressed, the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it."

He referred in support of this dictum to an English decision, *Felthouse v. Bindley* (2). As is observed in the commentary to S. 7, Contract Act, edited by Pollock and D. F. Mulla:

"Neglect to answer a business offer is certainly not, as a rule, prudent or laudable; still there is no legal duty to answer at all."

The facts of this case however are different, for we find that not merely was there a written proposal conveyed from the plaintiffs to the defendants, but the plaintiffs along with the written order sent a sum of money which the defendants accepted.

In these circumstances, I think, it was open to the Court below to find that there was an acceptance of the plaintiffs' proposal. The acceptance of a proposal must be absolute and unqualified, but it is also well established that an acceptance may be made without express communication. Here it seems to me the Judge of the Court below could reasonably find that the conduct of the defendants in receiving this sum of money and crediting it to

(1) [1900] 24 Bom. 510=2 Bom. L. R. 691.

(2) [1862] 6 L. T. (n. s.) 157=11 C. B. (n. s.) 869=31 L. J. C. P. 204=10 W. R. 423=142 E. R. 1037=132 R. R. 784.

their account amounted to a definite acceptance of the plaintiffs' proposal. For these reasons I am unable to hold in favour of the applicants that the decision of the Court below is not in accordance with law. The application fails accordingly and is dismissed with costs to the opposite party, including in this Court fees on the higher scale.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 9 (1)

TUDBALL AND RAFIQUE, JJ.

Jwala Prasad — Defendant — Appellant.

v.

Mannu and others — Plaintiffs — Respondents.

Second Appeal No. 1282 of 1918, Decided on 20th December 1919, from decree of Dist. Judge, Farrukhabad, D/- 15th August 1918.

Pre-emption—Claim must be with respect to the whole and not portion—To raise money and to prevent pre-emption, deed of gift of portion and mortgage of other portion executed in favour of same person—Both deeds constituting one transaction of mortgage—Pre-emption ought to be claimed with respect to whole.

In a suit for pre-emption the plaintiff must sue in respect of the whole of the property sold or mortgaged, and not only for a portion of it. When in order to raise money to redeem a mortgage and to prevent any question of pre-emption being raised, the mortgagor executed a deed of gift of a portion of the property and almost simultaneously executed a simple mortgage of the remaining portion of the property in favour of the same person, and it was found that the two documents constituted one and the same transaction and that that transaction was a simple mortgage of the property covered by the two deeds, a suit for pre-emption in respect of the property covered by one only of the deeds was held not to be maintainable, on the ground that the plaintiff ought to have sued in respect of both transactions. [P 9 C 2]

Gulzari Lal—for Appellant.

S. N. Sen—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption or rather one might say, for pre-mortgage. Curiously enough it has resulted in the Courts below giving a decree for redemption of a mortgage, though we fancy that this was a clerical error. The facts are as follows: The mortgagors are the owners of certain property which was mortgaged to the plaintiffs-pre-emptors with possession. The mortgagors brought a suit for redemption of the mortgage and obtained a decree. In order to raise money they went to the

defendant-appellant, *Jwala Prasad*, and to prevent any question of pre-emption being raised, they executed ostensibly a deed of gift in his favour for two biswas and a decimal share and followed this up with a simple mortgage of another portion of the property. The Courts below have found, and rightly so, that these two documents really constitute one and the same transaction and that that transaction was a simple mortgage of the property covered by the two deeds. The plaintiffs-pre-emptors however came into Court suing only in respect of the one document, the ostensible deed of gift. The date of this document is 12th January 1917. The date of the subsequent mortgage is 17th April 1917. If the facts are as found by the Court below, and we must accept that finding, then the plaintiffs ought to have sued in respect of both transactions and to have claimed the right to take a pre-mortgage of the property in preference to the defendant-appellant. This they failed to do, if they sought to take a pre-mortgage of only a portion of the property mortgaged. They were fully aware of all the facts of the case. Apparently no separate suit has been brought in respect of the deed of 17th April 1917 and it now comes to this: that the plaintiffs have got a decree in respect of a part only of the property, whereas under the law they are not entitled to take a portion of the mortgage but must take the whole of it. The point appears to have escaped the attention of the Courts below but it is a point which is fatal to the plaintiff's case. The decree for redemption passed by the Courts below was clearly a clerical error for a decree for pre-emption. The result is that on the above facts the plaintiffs' suit must fail and it is therefore dismissed with costs in all Courts.

V.B./R.K.

Appeal decreed.

A. I. R. 1919 Allahabad 9 (2)

KNOX, J.

Sahdeo—Applicant.

v.

Sarjoo and others—Opposite Parties.

Criminal Revn. No. 703 of 1919, Decided on 27th November 1919.

Criminal P. C. (1898), Ss. 209, 210 and 213—Prima facie case made out—Magistrate must commit and not try case himself.

Where a prima facie case is made out against an accused person in the Court of a Magistrate, and the case is triable exclusively by a Court of Ses-

sion, the Magistrate ought to commit the accused for trial by that Court, and not dispose of the case himself. [P 10 C 1]

R. R. Sorabji—for Applicant.

A. S. Osborne—for Opposite Parties.

Judgment.—This is an application asking this Court to revise an order passed by a Magistrate of the First Class at Allahabad. The complaint before the Magistrate was a complaint of an offence under S. 302, I. P. C. That of course was a case triable by the Court of Session only. The Magistrate dismissed the complaint. I am asked to direct a further inquiry. I find on turning to the judgment of Mr. Bisheshar Nath, Magistrate of the First Class, dated 14th July 1919, that he is of opinion that

"there can be no doubt that the man was murdered and probably one or all of the accused are directly or indirectly involved in it. That an attempt of the deceased's brother to fabricate evidence with the help of the head Muharrir has spoilt the whole case."

This was most certainly a case in which the learned Magistrate should never have passed an order of discharge. It is evident from what he has written that there was a *prima facie* case, and that case triable by the Court of Session only. This Court has often pointed out to learned Magistrates that they should not dispose of a case, triable by the Court of Session only, when there is a *prima facie* case before them. The remarks made by the learned Magistrate are:

"I do not feel justified in wasting the time of the Court of Session by sending up a case which was useless to stand upon."

Whatever they may mean I direct further inquiry to be made into the case, and when the further enquiry is complete, the case be committed for trial to the Court of Session under a charge declaring that the accused is charged with an offence under S. 302, I. P. C. It will be for the Court of Session to decide the case.

Let the record be returned.

V.B./R.K.

Record returned.

A. I. R. 1919 Allahabad 10

BANERJI AND PIGGOTT, JJ.

Hanuman Prasad Narain Singh — Auction-Purchaser—Appellant.

v.

Harakh Narain and *another*— Judgment-debtor and Decree-holders — Respondents.

Execution Second Appeal No. 7 of 1919, Decided on 13th November 1919.

(a) **Bundelkhand Alienation of Land Act (2 of 1903), S. 17—S. 17 does not apply to decree on mortgage after Act.**

Section 17 does not apply to a decree obtained on the strength of a mortgage made after the commencement of that Act. [P 10 C 2]

(b) **Provincial Insolvency Act (3 of 1907), Ss. 16, (2) (a)—Property of member of agricultural tribe exempt from attachment and sale under S. 16, Act 2 of 1903, does not vest in receiver.**

Inasmuch as under S. 16 (2) (a), Provincial Insolvency Act, the property of an insolvent which is exempt from attachment and sale in execution of a decree does not vest in the receiver and as under S. 16, Bundelkhand Alienation of Land Act the property of a member of an agricultural tribe cannot be sold in execution of a decree consequently where a member of an agricultural tribe becomes an insolvent, his property does not vest in the receiver. [P 11 C 2]

Jang Bahadur Lal and *Shiba Prasad Sinha*—for Appellant.

Gulzari Lal and *Binoy Kumar Mukerji*—for Respondents.

Judgment.—The facts which have given rise to this appeal are these: One Harakh Narain, a member of an agricultural tribe to whom the Bundelkhand Land Alienation Act applies, made a mortgage of certain property in favour of one Sheo Tahal on 17th February 1911. i. e., after the aforesaid Act had come into operation. Sheo Tahal obtained a decree for sale on the mortgage on 19th June 1916 and this decree was made absolute on 3rd March 1917. After the making of the decree Harakh Narain was adjudged an insolvent. The decree-holder put the decree into execution and applied for sale of the mortgaged property. Thereupon Harakh Narain preferred an objection before the Court on the ground that in view of the provisions of S. 16, Bundelkhand Land Alienation Act, the property was not liable to sale and it should not be brought to sale by the Court. This objection was overruled by the Court of first instance which sold the property. It was purchased by the present appellant. Harakh Narain appealed against the order of the Court of first instance, and the lower appellate Court held that the property was not liable to sale but directed proceedings to be taken under S. 17, Bundelkhand Land Alienation Act.

We may observe here that S. 17 of the Act is wholly inapplicable to the present case inasmuch as that section provides for the case of a decree passed on a mortgage made before the commencement of the Act. The mortgage in the present

case having been made after the commencement of the Act, S. 17 has no application to the decree obtained on the strength of such a mortgage. S. 16 of the Act provides that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court made after the commencement of this Act. The section clearly prohibits the sale by any Court in execution of any decree or order which may have been made by a Civil or Revenue Court after the commencement of the Act. The decree in the present case was made by a civil Court after the commencement of the Act and therefore the section applies to that decree and forbids the sale of the property of Harakh Narain who is a member of an agricultural tribe. It is contended on behalf of the appellant that as a decree had already been passed against Harakh Narain for sale of the mortgaged property it was not competent to him to object that the property was not liable to sale. This contention has in our opinion, no force. As we have already pointed out the section positively prohibits the sale of the property of a member of an agricultural tribe in execution of any decree. Therefore whether Harakh Narain could raise any objection or not the Court had no power by reason of the provisions of this section to sell property which is admittedly the property of a member of an agricultural tribe.

It is next urged that Harakh Narain having been adjudged an insolvent, his property vested in the receiver and the receiver not being a member of an agricultural tribe the property in question was liable to sale and S. 16 did not apply. This contention also is in our opinion without force. In the first place, the property is to be sold as the property of Harakh Narain and not as the property of the receiver. In the next place this property did not vest in the receiver, inasmuch as S. 16, sub-S. (2), Cl. (a), Provincial Insolvency Act, provides that the property which is exempted by any enactment for the time being in force from liability to attachment and sale in execution of a decree shall not vest in the receiver. The property in this case was property which by reason of S. 16, Bundelkhand Land Alienation Act, was not liable to sale in execution of a decree and therefore this property did

not vest in the receiver. We are therefore of opinion that the objection raised as regards the sale of the property, in the Court of first instance was a valid objection and the property was not liable to sale in execution of the mortgagee's decree. As the order for sale was an invalid and illegal order the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The result is that this appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 11

PIGGOTT AND DALAL, JJ.

Mahomed Yamin—Petitioner.

v.

Razia Begam—Opposite Party.

Application in First Appeal No. 121 of 1919, Decided on 3rd November 1919.

Civil P. C. (5 of 1908), O. 39, R. 1—In appeal by husband, against decree for declaration that plaintiff ceased to be wife by exercise of option of puberty, husband applying for injunction to restrain her marriage pending appeal—Application held not maintainable.

A Mahomedan wife obtained a declaration against her husband that she had ceased to be his wife by the reason of the fact that she had exercised against him the option of puberty given by the Mahomedan law. The husband appealed from the decree, and during the pendency of the appeal, applied for a temporary injunction restraining certain relatives of his wife, who were parties to a cross-suit by the husband for restitution of conjugal rights which had been dismissed and was also the subject of an appeal, from giving the woman away in marriage before the disposal of the appeals:

Held: that the application was not maintainable. [P 12 C 1]

S. M. Sulaiman—for Petitioner.

S. A. Haidar—for Opposite Party.

Judgment.—The litigation out of which the application before us arises related to the position of Muhammad Yamin, the appellant in this Court, as the husband of Mt. Razia Begam. He sued for restitution of conjugal rights and for a declaration of his legal status as the woman's husband. There was a cross-suit based upon an allegation by the woman that she had ceased to be the wife of Muhammad Yamin, if she ever was by reason of the fact that she had exercised against him the option of puberty given by the Mahomedan law. Appeals are now pending against the decision of the Court below, which was in favour of the lady's contention. In this application the prayer is that the defendants be prohibi-

ted from giving away Mt. Razia Begam in marriage to anyone, before the disposal of the aforesaid appeals. As it stands the prayer in the application must be understood to refer to the defendants other than the lady herself, who are relatives of hers. It is obvious that such an application could not by any stretch of language be brought within the purview of R. 1, O. 39, Civil P. C. It is not so clear that an application of this nature might not, under certain circumstances, be taken cognizance of by a Court of justice as falling under R. 2 of the same order. In the present case there was a relief by way of injunction sought in Muhammad Yamin's suit, that is to say, he asked for an injunction against the defendants other than Razia Begam, to the effect that they should not place any hindrance in the way of the lady's return to his house. It is contended that this was a suit for restraining these defendants from committing or at any rate assisting in the commission of a breach of the contract of marriage between the parties, or in the alternative for restraining them from committing an injury against the marital right of the petitioner.

From this the argument is advanced that the present petition is merely one for a temporary injunction to restrain certain defendants from committing a breach of contract, or injury of a like kind, arising out of the same contract or relating to the same marital rights. Under the circumstances of the case we think it would be doing some violence to the language of the rule to bring this application within its scope. We note moreover that, according to its terms, the application seeks no remedy against Mt. Razi-Begam herself. She is now, under the religious law governing the parties, of an age to enter into a contract of marriage on her own account, and an injunction directed against the remaining defendants would be meaningless if it were not accompanied by some injunction addressed to the lady herself. It has been suggested that we might allow the application to be amended; but the fact remains that, from the petitioner's point of view, and accepting for the purpose of argument his contention that the lady is still in the eye of the law his wife, any such injunction addressed to the lady as the appellant now suggests would amount virtually to an injunction not to commit

adultery. Under the circumstances of the case we do not think that this Court ought to interfere in the manner suggested, and we dismiss the application with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 12

LINDSAY, J.

Mizaji Lal—Petitioner.

v.

Partab Kuar—Opposite Party.

Civil Revn. No. 28 of 1919, Decided on 20th November 1919, from order of Munsif, Mainpuri, D/- 18th December 1918.

Provincial Small Causes Courts Act (9 of 1887), Art. 24—Claim for money under award is cognizable.

A suit to recover money payable under an award is cognizable by a Court of Small Causes.

[P 13 C 1]

Narain Prasad Asthana—for Petitioner.

Judgment.—This is an application under S. 25, Provincial Small Cause Courts Act (9 of 1887). The question for decision is whether or not the suit was cognizable by a Court of Small Causes. The lower Court held that it was so cognizable. It is contended here in revision that the suit was not entertainable. It seems that an award had been made out of Court between the parties under which a certain sum of money had been declared payable to the plaintiff. The plaintiff brought this suit accordingly to recover the amount so named. Mr. Narain Prasad has referred me to Art. 24, Sch. 2, Provincial Small Cause Courts Act (9 of 1887). According to that article a suit to contest an award is not triable by a Court of Small Causes. The answer to this argument is that the present suit was not a suit to contest an award. On the contrary it was a suit to enforce an award by asking for delivery of the money which was payable under the award.

The learned counsel has referred me to the decision in *Madho Prasad v. Lalta Prasad* (1). There the suit was of a nature similar to that of the present suit and the Court held that the suit was not cognizable by the Court of Small Causes. It is apparent however that this decision was delivered with reference to the language of the old Small Cause Courts Act (4 of 1865). A reference to S. 6 of this old Act shows that certain suits were declared to be cognizable by Courts of

(1) [1881] A. W. N. 159.

Small Causes and consequently by implication all other suits were excluded from Small Cause Court jurisdiction. It is clear that under the old Act the present suit would not have been entertainable in a Court of Small Causes, but the scheme of the Act has been altered and I am unable to find any provision in the Sch. 2, to the present Act (9 of 1887), which would indicate that a suit for money due under an award is not a suit which is cognizable by a Court of Small Causes. In my opinion it was so cognizable and I think the decision of the Judge of the Court below was correct, I dismiss the application. I make no order as to costs as the proceedings have been *ex parte*.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 13 (1)

TUDBALL, J.

Ncor—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 711 of 1919, Decided on 5th December 1919, from order of Sess. Judge, Kumaun, D/- 21-10-1919.

(a) Criminal P. C. (5 of 1898), S. 164—Statement by prisoner in jail implicating another if retracted is not admissible against other person.

A statement made by a prisoner undergoing a sentence of imprisonment implicating another person in the commission of the offence for which he was convicted and subsequently retracted by him when produced as a witness, is not admissible in evidence against that other person.

[P 13 C 2]

(b) Criminal Trial—Conviction.

A conviction based on mere suspicion is bad.

[P 13 C 2]

S. M. Sulaiman—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—The applicant was convicted for aiding and abetting an offence under S. 355, I. P. C., and he was originally sentenced to one year's rigorous imprisonment, which on appeal was reduced to six months' rigorous imprisonment. One Jakka Khan laid in wait for Hafiz Abdul Jalil, a Municipal Commissioner at Pilibhit, after the meeting of the Municipal Board at the Town Hall in that town. He threw a shoe into the carriage. He was prosecuted for an offence under S. 355 of the Code and was sentenced. Throughout the course of that trial no mention whatsoever was made of Bijji Khan the present applicant or of his complicity in the matter. Subsequently while Jakka Khan was serving

his sentence, he was placed before a Magistrate by a police officer and made a certain statement implicating the present applicant. Proceedings were therefore taken against the latter. Jakka Khan was examined as a witness and totally denied Bijji Khan's implication in the matter. His statement as recorded by the Magistrate, ostensibly under S. 164, Criminal P. C., (which however did not apply) was taken into evidence by the Magistrate at the trial of Bijji Khan. It is not clear under what provision of the law this was done. No provision of the law has been shown to me under which it could possibly have been done. There was further evidence taken which one might accept that shortly before the occurrence Bijji Khan was seen talking to Jakka Khan. There is also evidence which showed that after the occurrence Bijji Khan told the brother of Abdul Jalil what had happened. That is to say, he told him that his brother had been beaten with a shoe and had fallen to the ground. It is denied that there was any actual beating or that Abdul Jalil actually fell on the ground. On this evidence Bijji Khan has been convicted. I notice on the record that there is a good deal recorded which was quite inadmissible in evidence. No particularly strong motive has even been suggested in the course of the trial for Bijji Khan to have incited Jakka Khan to commit the offence. Therefore though there may be some suspicion arising from the statement made by the applicant to the brother of Abdul Jalil and by the fact that shortly before the occurrence he was seen speaking to Jakka Khan, these circumstances are not in themselves sufficiently strong for a Court to hold that beyond all reasonable doubt Jakka Khan acted at the instigation of the applicant. The evidence in my opinion, is insufficient to support the conviction. I therefore allow the application, set aside the conviction and sentence and direct the applicant to be released.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 13 (2)

Full Bench

BANERJI, RAFIQUE AND PIGGOTT, JJ.

Ram Sarup—Petitioner.

v.

Tika Ram Vakil—Opposite Party.

Civil Misc. No. 325 of 1919, Decided on 12th August 1919.

(a) Allahabad High Court Rules, Part 2, R. 26—Carrying on existing family business is not entering into trade within R. 26.

The carrying on of a family business by a vakil, which has been in existence for a long time, does not amount to entering into any trade or business within the meaning of para. 2, R. 26, Part 2, Allahabad High Court Rules. [P 14 C 1]

(b) Allahabad High Court Rules, Part 2, R. 26—Vakil entering into commercial transaction must obtain High Court's permission.

Before a vakil embarks on any commercial transactions he should give notice to and obtain the permission of the High Court. [P 14 C 2]

Nehal Chand—for Opposite Party.

Judgment.—This is an application by one Ram Sarup praying that notice be taken of the conduct of Babu Tikā Ram, a vakil of this Court, now practising at Agra, it being alleged that he is guilty of professional misconduct. The misconduct imputed to the vakil is a violation of R. 26, Part 2, of the High Court Rules. Para. 1 of that rule provides that if an applicant for admission as a practitioner holds any appointment or carries on any trade or other business the High Court may refuse to admit him, or pass such orders on his application as it thinks proper. That paragraph has no bearing on the present case, inasmuch as in the petition before us it is not asserted that at the time when the vakil applied in 1894 for admission, he was carrying on any trade or business. It is the provision of para. 2 of the rule which the vakil is alleged to have contravened. That paragraph requires that any person who, having been admitted as a legal practitioner shall accept any appointment or shall enter into any trade or other business, shall give notice thereof to the High Court. It is said that this vakil has since his enrolment been carrying on business in grain and other articles and has not given notice of his having entered into such business to this Court. The vakil has filed an explanation, and in this explanation he states that there was a joint family business which used to be carried on from the time of his grandfather, that he and his father and uncle were members of the joint family and that he as a member of the joint family had an interest in that business. That business, according to his allegation, has long been closed and this is not denied by the applicant. We do not think that the carrying on of a family business, which has been in existence for a long time, may be regarded as entering into any trade or

business within the meaning of the rule. The vakil has admitted that from time to time he entered into transactions for the sale of grain, salt, cotton seeds, etc., by way of speculation, but he has not done so habitually. He has mentioned eight instances, seven of which were instances of business carried on in the years 1915, 1916 and 1917. It does not appear that he has habitually or systematically exercised the profession of a trade in addition to his work as a vakil. We do not think therefore that he can be held to have violated the provisions of the rule to which we have referred. We think however that it was not proper for him to have entered into the alleged transactions while he was carrying on the business of a vakil, although those transactions were only isolated ones. We do not think that the fact that he helped his son in borrowing money for the business, which his son is alleged to have carried on, on his own account would amount to a violation of R. 26. Under those circumstances we are of opinion that further action is not called for in this case. At the same time we think that the vakil should give an undertaking to the Court that he will not enter into any business or trade without giving notice to the Court and obtaining its permission. Such undertaking has been given to us by Mr. Nehal Chand who appears on behalf of the vakil and by the vakil who is himself present in Court. The Rule issued to the vakil is accordingly discharged.

V.B./R.K.

Rule discharged.

A. I. R. 1919 Allahabad 14

MEARS, C. J. AND BANERJI, J.

Ram Narain—Appellant.

v.

Harnam Das and another — Respondents.

Privy Council Appeal No. 5 of 1918, Decided on 21st November 1919.

(a) Civil P. C. (5 of 1908), O. 45, R. 13—Proceeding under preliminary decree being one in suit cannot be ordered to be stayed.

Inasmuch as proceedings under a preliminary decree are not proceedings in execution of a decree, but are proceedings in the suit for a final decree, an application to stay such proceedings cannot be entertained under the provisions of O. 45, R. 13. [P 15 C 1]

(b) Civil P. C. (5 of 1908), O. 45, R. 13—When stay of execution should be granted stated.

Where an appellant is pursuing his appeal expeditiously, the Courts should be very chary of removing property from his possession and plac-

ing it in the hands of another who may ultimately be found never to have been entitled to it.
[P 15 C 1]

K. N. Katju and S. Raza Ali—for Appellant.

Panna Lal—for Respondents.

Mears, C. J.—In this case the appellant is appealing to the Privy Council in respect of proceedings brought and which have up to the present resulted in a preliminary decree of this Court, which decides that the property in dispute in the action is joint property and is liable to partition. Proceedings to ascertain the respective shares are pending or in process of taking place in the Court below, and the appellant has applied to this Court with a view to our staying such proceedings. He has filed an affidavit in which he gives reasons which *prima facie* are good reasons for assenting to that application if, in fact, we have the power to grant it. But our attention has been called to the provisions of O. 45, R. 13, and to the case of *Laliteswar Singh v. Bhabeswar Singh* (1) from which it appears clear that as the matter now stands we have no power to stay these proceedings. Now at one stage of the matter I thought it extremely desirable that an application should be made to the Court below so that if possible the Judge should make an order adjourning the partition proceedings until the decision of the Privy Council was known. But it has been pointed out that the property consists of a few houses and that the movable part of it is in cash and shares—things whose value is easily ascertainable. Further it has been pointed out that when the respondent to the appeal, the present holder of the decree, applies to execute the decree, it will then be open to the appellant to urge before the Judge of the lower Court reasons why execution should be stayed. I think generally that it would be desirable, and I have no doubt that it is the practice for Judges in the lower Courts to be very cautious in these cases, and where they find an appellant pursuing an appeal expeditiously, to be very chary of removing property from the possession of one litigant and placing it in the hands of another who may ultimately be found by the Privy Council never to have been entitled to it. Therefore if an application is made to execute this decree, I hope that the

(1) [1909] 1 I. C. 812.

learned Judge in the Court below will give due consideration to all the circumstances and will do his best to prevent the property already in the possession of the appellant from passing into the hands of the respondent until the decision of the Privy Council is made known.

Banerji, J.—I also am of opinion that this application cannot be entertained under the provisions of O. 45, R. 13. The proceedings in the Court below are not proceedings in execution of a decree, but are proceedings in the suit for a final decree for partition. The decree which has already been made is a preliminary decree, and this decree has to be made absolute before execution can be taken out. At present the case has not proceeded beyond the stage of a suit in which a preliminary decree has been passed and in which further proceedings are to be taken for the making of a final decree Order 45, R. 13, only empowers this Court to direct stay of execution in certain cases where sufficient reason is shown. In the present case no final decree has been passed and no proceedings have been taken for execution of a decree. Therefore the present application is not justified by the provisions of the rule to which I have referred and it seems to me to be premature. When an application for execution is made after the passing of the final decree it will then be time for the present applicant to make such application as may be proper. In my opinion this application should be dismissed with costs.

By the Court.—The order of the Court is that the application is dismissed with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 15

KNOX, J.

Ulfat Rai—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 599 of 1919. Decided on 20th December 1919, against order of Sess. Judge, Mainpuri, D/- 1-9-1919.

(a) Criminal P. C. (5 of 1898), S. 476—**Notice to accused is not obligatory.**

Before making an order under S. 476, the Court is not bound to issue notice to the accused.

[P 16 C 2]

(b) Criminal P. C. (5 of 1898), S. 476—**Preliminary inquiry is not obligatory.**

Where a Court after very careful consideration arrives at the conclusion that an order under S. 476, is called for, and that no preliminary in-

quiry is necessary, the omission to make such inquiry is a mere irregularity within S. 537 of the Code. [P 17 C 1]

J. M. Banerji—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is an application in revision. The order I am asked to revise is an order passed by the Sessions Judge of Mainpuri. It is dated 1st September 1919 and was passed in the case of *King-Emperor v. Babu Ulfat Rai*. That order is on the record. It directs that Babu Ulfat Rai should be prosecuted for offences falling under S. 196, I. P. C., and under S. 193, I. P. C. It further directs under S. 476, Criminal P. C., that the case be sent down to the District Magistrate for trial by himself or any First Class Magistrate subordinate to him. There has been a great deal of argument addressed to me but the only point that I have to consider is whether the action of the learned Sessions Judge in passing the order under S. 476, Criminal P. C., was contrary to law. According to an affidavit which will be found on the record and which is dated 15th September 1919, that being the date on which the affidavit was affirmed before a Notary Public Babu Ulfat Rai was served with a notice to show cause on 20th August 1919 as to why he should not be prosecuted under Ss. 193 and 196. It is asserted in the affidavit that Babu Ulfat Rai at once applied for urgent copies of the statements of witnesses recorded in his absence against him and of other papers. These copies were not supplied to the applicant by 1st September 1919, the date on which the order already alluded to was passed under S. 476, Criminal P. C. That Babu Ulfat Rai applied more than once and applied in vain for adjournments to enable him to put himself in a position to show cause.

What then I have to determine is whether the order passed on 1st September 1919 is correct, legal, proper or otherwise and whether the proceedings of the Court passing the order have been regular. The Court which passed the order was, as has been already noticed, a criminal Court. The officer presiding in that Court was an officer of experience and standing.

(1) He had jurisdiction to pass an order under S. 476, Criminal P. C.

(2) If he considered it necessary he had to make a preliminary inquiry.

(3) And then to send the case for in-

quiry or trial to the nearest Magistrate of the First Class.

There is nothing in S. 476 which requires a criminal Court, before passing an order under S. 476, to issue notice upon the accused to show cause why action should not be taken under S. 476. So far then the proceedings taken by the Sessions Court appear to have been regular throughout. The order passed appears to have been correct and legal. It only remains for me to decide whether the order considering the circumstances under which it was passed was proper.

In connexion however with this it is necessary also to consider what has been laid down by the law in S. 537, Criminal P. C. In that section it is laid down that no order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any irregularity in proceedings taken under S. 476, unless such irregularity has in fact occasioned a failure of justice. In other words, there must be an irregularity in proceedings followed by what under the law amounted to a failure of justice.

Notice was called by the applicant to what he considered irregular at a very early stage in the proceedings.

To return to whether the passing of the order under S. 476 was an irregular proceeding. This Court has in a previous case, vide *Ram Piari Rai v. Emperor* (1), held that: (1) there is nothing in S. 476 which requires that notice shall be given to a person who is immediately concerned thereby and (2) that this Court has always looked with disfavour upon an order made under S. 476 without notice being given to the persons immediately concerned. But there is considerable distance between looking with disfavour upon an order and reversing the order as being an order contrary to law.

The circumstances before me are peculiar. There had been a long and elaborate trial resulting in a very considered judgment and in that judgment the circumstances are set out which in the opinion of the learned Sessions Judge, called upon him to pass the order which he did on 1st September 1919. It is not a case in which it can be said that the Judge had not looked at length into the proceedings antecedent to the order he passed. When he issued the notice on 12th August 1919 he was in the act of

(1) [1912] 16 I. C. 515.

setting forth his judgment and the reasons for his judgment in the main case. He was then of opinion that an offence had been committed under Ss. 196 and 193, I. P. C. He was, as that judgment shows, making a mental inquiry and by 1st September 1919, when he passed his order he had arrived at the conclusion that an order under S. 476 was called for. He had come to the conclusion that no preliminary inquiry was necessary and appears to have acted upon this conclusion. As he had issued notice, it would have been better if he had heard anything that Ulfat Rai had to offer in explanation and given him opportunity for considering what he should or what his advisers should say.

Section 476 lays down a peculiar form of procedure. Instead of the alleged offence being sent to the Court which, having regard to the provisions of Ch. 157 of the Code, would have jurisdiction to try, the Court under S. 476 has to send the case for inquiry or trial to the nearest Magistrate of the First Class, and such Magistrate shall thereupon proceed, &c.; all this points to the intention that the trial should be held without any unnecessary delay.

It must always be remembered that the Judge was not trying the case or entering himself upon proceedings to determine the offences under Ss. 193 and 196. He was not depriving the accused of making a full and complete answer to such trial of those offences as might be entered upon. He was not depriving Ulfat Rai of opportunities to give his answer to the charge. The utmost that could be urged was that Ulfat Rai, by not having been given an opportunity to show cause was put in peril of a longer trial than might perhaps be actually necessary. His action in passing the order under S. 476 was not in fact occasioning a failure of justice. There had been long drawn out proceedings which called for as early a decision as possible.

Acting under the provisions of S. 537, Criminal P. C., I am not prepared to alter the order passed and I reject this application.

V.B./R.K. *Application rejected.*

A. I. R. 1919 Allahabad 17

LINDSAY, J.

L. Ramsaran Das—Plaintiff—Applicant.

v.

Sagar Mal and *others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 22 of 1919, Decided on 20th November 1919, against order of Sm. C. C. Judge, Meerut, D/- 9th December 1918.

Contribution—Costs—Suit for contribution for costs awarded against defendants jointly lies.

Where in the case of a joint decree against several defendants costs are awarded to the plaintiff, and these are realized from one defendant alone, that defendant is entitled to maintain a suit against his co-defendants for contribution.

[P 17 C 2]

Kailas Chandra Maithal—for Applicant.

Judgment.—This application has been argued ex parte; no one appears for the defendants opposite parties. The suit as framed was a suit for contribution, the case for the plaintiff being that he and the defendants had been co-defendants in a partition suit. In that partition suit a decree for costs was passed against all of the defendants and in favour of the plaintiffs. The decree for costs was a joint decree and the result was that execution was taken out against the present plaintiff, who was obliged to pay the entire costs awarded by the decree. The suit with which I am now concerned has therefore been brought against the remaining defendants for the purpose of obtaining contribution. The Judge of the Court below has relied upon a ruling reported as *Mulla v. Jagannath* (1), which does not, in my opinion govern the facts of this case. There is a ruling reported as *Nihal Singh v. Collector of Bulandshahr* (2), which seems to me to be in point. Applying the principle laid down in this latter ruling I hold that the plaintiff here was entitled to maintain the suit for contribution. It may also be observed here that the defendants did not in their written statement of defence raise any plea to the effect that the suit for contribution was not maintainable; consequently it is difficult to say upon what pleadings the Court below raised issue 1 which it has decided adversely to the plaintiff. I allow the application, set aside the order of the Court below and

(1) [1910] 32 All. 585=6 I. C. 684.

(2) [1916] 38 All. 237=33 I. C. 165.

direct the Judge to entertain the suit and to dispose of it on the merits. The applicant is entitled to his costs in this Court.

V.B/R.K.

Application allowed.

A. I. R. 1919 Allahabad 18

BANERJI AND WALLACH, JJ.

Alayar Khan—Plaintiff—Appellant.

v.

Mt. Bibi Kunwar—Defendant — Respondent.

Second Appeal No. 944 of 1917, Decided on 18th July 1919, against decision of Dist. Judge, Bareilly, D/- 17th April 1917.

Limitation Act (9 of 1908), Art. 61 — Suit for recovery of revenue paid by person in possession subsequently relinquished is governed by Art. 61— Limitation begins from last payment.

The period of limitation for a suit to recover revenue paid by the plaintiff while in possession of immovable property, but of which he subsequently relinquished possession, is contained in Art. 61, and the period commences to run from the date on which the last payment was made.

[P 19 C 1]

Raza Ali—for Appellant.

Lakshmi Narain for Iswar Saran—for Respondent.

Judgment.—The suit out of which this appeal arises was brought under the following circumstances: One Jai Ram was the owner of certain immovable property. Upon his death in 1910 disputes arose between his widow Mt. Bibi Kunwar and his nephew Baijnath. The former alleged that Jai Ram was separate and that she, as his widow, was entitled to his property. Baijnath, who was the brother's son of Jai Ram asserted that he and Jai Ram were members of a joint family, and that therefore upon Jai Ram's death he succeeded to the property by right of survivorship. These disputes were raised in mutation proceedings. The Court of first instance held that the family was joint and ordered the name of Baijnath to be entered in the revenue papers. This order was passed on 23rd December 1910. On appeal the aforesaid order was set aside and the appellate Court held on 18th April 1911 that Bibi Kunwar was entitled to the property, her husband having been separate from his nephew, and directed her name to be entered. Upon the passing of the order of the Court of first instance Baijnath took possession and between the date of the order of the first Court and that of

the order of the appellate Court he collected rents and profits to the extent of Rs. 1,218-14-8 from tenants and paid Rs. 1,226-8-3 on account of Government revenue. After the passing of the order of the appellate Court he had to relinquish possession as he apparently acquiesced in the decision of that Court. Some of the tenants sued him for a refund of the rents which he had realized from them and obtained decrees. He thereupon assigned to the plaintiff his alleged right to recover from the defendant the revenue which he had paid in respect of the property. The plaintiff by virtue of this assignment brought the present suit for recovery of Rs. 1,226-8-3 and interest thereon. He alleged his cause of action to have arisen when the tenants obtained a decree against Baijnath on 29th March 1913. The suit was instituted on 28th March 1916. The defendant pleaded limitation and the question was what article of the Limitation Act governs the present suit. The Court of first instance decreed a part of the claim. It did not decide what article of the Limitation Act applied to the case. The lower appellate Court was of opinion that Art. 97 was applicable and that limitation was to be computed under that article from 18th April 1911, the date of the decision of the appellate Court when Baijnath relinquished possession. That Court dismissed the suit as time barred. In our opinion Art. 97 has no application to the present case. That article provides for suits for money paid upon an existing consideration which afterwards fails. The consideration for payment of the revenue could not be the realization of rents from the tenants. The revenue was paid because the property was liable for revenue and demand was made for it. It was payable by the person in possession, whether he had collected rents or not. Therefore the collection of rents was not the consideration for the payment of the revenue, as held by the Court of first instance and contended for by the learned vakil for the appellant, and a refund of the rents cannot be said to be a failure of the consideration or part thereof. The learned vakil for the appellant has asked us to apply Art. 97 or Art. 120. We do not think that Art. 97 is applicable. If we assume that the consideration for the payment of revenue was possession by Baijnath of the property of

the defendant that consideration failed, as the learned Judge says, when possession was removed in April 1911. We do not however think that it could be said that the consideration for the payment of revenue was the fact that Baijnath was in possession. In our judgment the article applicable is Art. 61, which clearly applies to cases of this kind. That article provides for suits "for money payable to the plaintiff for money paid for the defendant" and limitation runs from the date on which the money was paid. Baijnath, the vendor of the plaintiff, paid the revenue which in reality was payable by the defendant. Therefore the money which he paid was money paid for the defendant and it is this money which is sought to be recovered by the present suit. As limitation for a suit of this kind should run from the date of payment and in the present case the last date of payment was some time prior to 18th April 1911, the present suit brought on 28th March 1916 is time barred. It is urged that if Baijnath had sued for the revenue which he had paid, it might have been contended on the defendant's behalf that as he had realized rents from the tenants he was not entitled to get anything more than the difference between the amount realized by him and the amount paid as revenue and that the present suit could not have been instituted unless Baijnath had refunded any part of the rents realized from the tenants.

We do not think that this is a valid contention. Baijnath could have sued if at all, for the balance of revenue due to him after giving credit for what he had realized. In that case the defendant could not have recovered the rent twice over from any of the tenants and the tenants could not have obtained a refund of the rents from Baijnath. If Baijnath has under the present circumstances sustained any loss, it is in consequence of his laches in not bringing his suit within the period of limitation prescribed for a suit of this kind. The learned vakil for the appellant in support of his contention that Art. 97 applies referred to the case of *Koji Ram v. Ishar Das* (1). In our opinion that case has no bearing on the present case and its facts are wholly distinguishable from the facts of this case, as in our opinion, Art. 61 is the article applicable to the present suit and there-

(1) [1886] 8 All.273=(1886) A. W. N. 95.

fore Art. 120 cannot apply. The Court below was therefore right in dismissing the suit on the ground of limitation, though its reasons are not the reasons for which we hold the suit to be time barred. We dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 19

RYVES, J.

Chander Shekhar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 664 of 1919, Decided on 26th November 1919, against order of Magistrate, 1st Class, Basti, D/- 26th August 1919.

(a) Criminal P. C. (5 of 1898), S. 107—**Without inquiry as to likelihood of breach of peace order to furnish security is illegal.**

It is illegal to make an order requiring a person to furnish security to keep the peace, without any inquiry as to whether he was likely to commit a breach of the peace, or was otherwise a proper subject for proceedings under S. 107.

[P 20 C 1]

(b) Criminal P. C. (5 of 1898), Ss. 107 and 439—**Consent to give security does not bar revision.**

The fact that a person has, in obedience to an order, expressed his willingness to furnish the security demanded to keep the peace, is no bar to his moving the High Court to set that order aside.

[P 20 C 1]

B. N. Vyas—for Petitioner.

Asst. Government Advocate—for the Crown.

Judgment.—On 13th June 1919 Mathra, the complainant, made a report at the police station in which he charged three persons with simple assault. On 16th June he filed a complaint in Court, in which he stated that the three persons whom he had already named at the police station, together with the applicant in the present case and a large number of their servants had attacked the complainant, had forcibly taken away his ox and begun to beat him and when the complainant's aunt came to rescue him, they beat her and stole her ornaments and decamped with the ox and the ornaments.

The charge which was originally against three persons only of simple assault had grown into a full fledged dacoity against a large number. When the matter came up for inquiry before the learned Magistrate, he proceeded to examine the complainant Mathra and then recorded the following order:

"In the first report complainant named only a very few persons and as the police had not challaned, it was for them to adduce evidence. I have examined Mathra, complainant and I have noticed his aversion to state facts against accused. The parties have colluded and it would be futile to proceed with the trial. Under the circumstances the prosecution will fail to give evidence in support of their version and I would therefore only bind down the selected accused under S. 107, Criminal P. C. The accused summoned will be discharged under S. 253, Criminal P. C."

He there and then issued notice to three of the accused, who are zamindars, calling on them to show cause why they should not furnish security to keep the peace for one year. On being asked what each of them had to say as to the notice served on them they replied that they were prepared to furnish the securities as demanded. One of these persons, namely, Chandra Shekhar, has moved this Court in revision against that order. I admitted the application and sent for the record. It seems to me that the order of the Magistrate was wholly illegal. There was no inquiry as to whether these persons were likely to commit a breach of the peace or were otherwise proper subjects for proceedings under S. 107, Criminal P. C. I do not think the fact that the applicant and his co-accused were prepared to give the securities demanded in any way prevents them from moving this Court. Following the cases reported as *Ram Chandra Halder v. Emperor* (1) and *Mul Chand v. Emperor* (2), I set aside the orders under S. 107, Criminal P. C. If the securities have been given they must be cancelled.

V.B./R.K.

Order set aside.

(1) [1908] 35 Cal. 674=8 C. L. J. 68=8 Cr. L. J. 128.

(2) A. I. R. 1914 All. 546=37 All. 30=26 I. C. 653.

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KNOX, AG. C. J. AND PIGGOTT, J.

Ram Prasad Singh—Judgment-debtor—Appellant.

v.

Benares Bank, Ltd.—Decree-holders—Respondents.

Letters Patent Appeal No. 66 of 1919, Decided on 21st July 1919, from judgment of Walsh, J.

Civil P. C. (5 of 1908). O. 39, R. 3—Formal notice is not essential when order is passed and communicated in presence of parties.

An order prohibiting a party from alienating his property, made in open Court in the presence of the parties duly appearing before it, must be

presumed to have been communicated to the party affected thereby, and it is no excuse for that party, if he disobeys such order, to urge that formal notice of the order had not been served on him personally. [P 22 C 1]

Nihal Chand—for Appellant.

B. E. O'Connor—for Respondents.

Judgment.—*Ram Prasad Singh* appeals against an order passed by a single Judge of this Court under the following circumstances: The appellant was one of three judgment-debtors in a decree obtained by the respondents (the Benares Bank, Limited), which decree was passed ex parte on 18th August 1917, by the Court of the Subordinate Judge of Benares. Between November 1917 and April 1918, the Bank got the decree transferred for execution to Patna, the appellant residing within the jurisdiction of the District Court of that place, and immovable property belonging to the appellant was attached in execution of the decree. On 23rd June 1918 *Ram Prasad Singh* brought a suit against the Benares Bank in the Court of the Subordinate Judge of Benares; the reliefs sought were that the decree of 18th August 1917 be set aside and that the Bank be restrained from proceeding against the property of the plaintiff. After the institution of the suit, and before it came on for trial, *Ram Prasad Singh* applied to the Court for the issue of an injunction restraining the Benares Bank from proceeding further with the execution of the ex parte decree. This prayer the learned Subordinate Judge granted, but only on condition that *Ram Prasad Singh* should furnish security, to the full amount of the decree, for its due performance in the event of his suit being dismissed. *Ram Prasad Singh* appealed to this Court against the imposition of this condition. His appeal was admitted on 27th July 1918 and registered as First Appeal from Order No. 119 of 1918. It had not yet been set down for hearing, when, on 15th November 1918, *Ram Prasad Singh* presented an application supported by an affidavit sworn the previous day.

This application was presented, in the ordinary course of business, to a single Judge of this Court; it asked that the Benares Bank might be restrained from continuing the execution proceedings at Patna until the disposal of the pending first appeal from order. It was represented that there was no need for the taking of security from the petitioner,

because the property taken in attachment by the Patna Court would remain under attachment and all that was asked was a postponement of the sale. The order passed was: "Stay meanwhile, let notice go to the other side." The learned Judge who passed this order had not been informed that on 14th November 1918, the very day on which the affidavit laid before him was sworn, at Patna had struck the execution proceedings off its file by reason of some default on the part of the local agent or representative of the Benares Bank. When the agents of the said Bank sought to continue the execution proceedings, the Court at Patna held itself to be unable to take any action by reason of the ex parte order passed by this Court on 15th November 1918, and refused even to renew the attachment. On this the Benares Bank presented a petition to this Court supported by affidavit on 7th December 1918, representing that the ex parte order had been obtained from a Judge who was ignorant of an essential fact in the case and that the Bank was now left without any security. The only relief in terms asked for was that the hearing of Ram Prasad Singh's application of 15th November 1918 should be expedited. This petition was laid before the learned Judge who had passed the order of that date; he pointed out that the Bank would not be protected against any alienation which Ram Prasad Singh might make of the property at first attached by the Patna Court, unless an injunction were issued restraining him from making such alienation. His order purports to direct the application of the Benares Bank to be amended in this sense, but no actual amendment was made. The important point is however that the Bank's prayer for the expediting of the hearing of the application of 15th November 1918 was granted: that application was ordered to be set down for disposal on 9th December 1918, along with the Bank's application of 7th December 1918. The learned Judge, after hearing both parties, and having no suggestion before him that either party desired an adjournment for any purpose, passed orders dealing with both the applications then before him, i. e., Ram Prasad Singh's application of 15th November 1918 and the Bank's application of 7th December 1918. In substance he ordered three things:

(a) That the hearing of first appeal from Order 119 of 1918 be expedited; this he could not do of his own authority, but he obtained an order from the Chief Justice to that effect; (b) that the Benares Bank might proceed with the execution of their decree in the Patna Court so far as taking out attachment of Ram Prasad Singh's immovable property, but should not take steps to bring any of his property to sale before the disposal of the aforesaid first appeal from order; (c) that until the disposal of the said appeal or until this Court might see fit otherwise to direct, Ram Prasad Singh should not alienate any of the property which had been under attachment by the Patna Court prior to 14th November 1918.

This order was passed in the presence of both parties, duly represented by counsel, and formal injunction to the same effect was also issued for service on Ram Prasad Singh personally.

This injunction was eventually returned unserved, the ministerial officer reporting that he was unable to find that gentleman at his ordinary place of residence. Almost immediately after this ineffectual attempt at personal service, that is to say, on 3rd January and 4th January 1919, Ram Prasad Singh executed two sale-deeds by which he purported to convey certain property including some of the property affected by this Court's order of 9th December 1918, to one of his second creditors. These deeds were registered together on 4th January 1919, and thus came to the knowledge of the agents of the Benares Bank.

On the application of the latter proceedings were taken against Ram Prasad Singh for breach of this Court's injunction of 9th December 1918. The learned Judge who issued the injunction has inquired into the matter and heard both parties. He has ordered that Ram Prasad Singh be detained in a civil jail for a period of six months, and that his property remain under attachment for a period of twelve months.

A number of points have been argued:

(a) It is contended that this Court's injunction of 9th December 1918 is ineffective for want of personal service on Ram Prasad Singh.

The circumstances under which the attempt to effect personal service failed are themselves suspicious, and we must

agree with the learned Judge of this Court that it is not possible really to believe that the prohibitory order, passed in open Court, in the presence of a responsible legal adviser, was never communicated to the person principally concerned. Apart from the merits we cannot hold the appellant absolved from all liability merely because of the failure of the attempt to effect personal service. The prohibitory order was passed in open Court; it may not technically have the effect of a decree, but it was passed in the presence of both parties duly appearing before the Court, and it takes effect from the date of its delivery, just as much as a permanent injunction embodied in a judgment and incorporated in a decree of the Court.

These findings really dispose of all the pleas taken in the memorandum of appeal, except two objections of a technical nature which may be more briefly disposed of.

(b) It is contended that the learned Judge of this Court had no jurisdiction to issue any injunction against Ram Prasad Singh, as the latter does not reside within the jurisdiction of the Court. On the abstract question we were referred to two decisions of the Calcutta High Court, one on each side: *Mungle Chand v. Gopal Ram* (1) affirming the existence of such jurisdiction and *Vulcan Iron Works v. Bishumbhur Prosad* (2) denying the same. The present case however seems to us a clear one. Ram Prasad Singh was an appellant before this Court and he had himself invoked the jurisdiction of this Court to take interim proceedings pending the decision of his appeal. The orders passed on 9th December 1918 must be considered as a whole; so considered their effect is clear. Ram Prasad Singh got a portion of what he wanted: the Benares Bank was restrained from actually bringing to sale any of his property pending the decision of his first appeal from order. He got this subject to a condition, namely, that he should not alienate certain property in the meantime. It was clearly within the jurisdiction of this Court to impose such a condition. It has been suggested that in any case no procedure is provided for punishing any breach of the condition so imposed. This argument turns in part on the interpretation to be put on O. 39, R. 2, Cl. (3), Civil P. C., The drafting of the rule is a little clumsy

because it has followed mechanically the arrangement of sections in the Civil Procedure Code of 1882, but we are satisfied that the words "in case of disobedience" are wide enough to cover breaches of injunctions issued under O. 39, R. (1), for which breaches no penalty is elsewhere provided. In any case this Court has unquestionably the power to punish contempt of its own orders. As regards the precise mode of execution of the order for imprisonment in the civil jail, that point may be considered when it arises. We should prefer to affirm the order without committing ourselves to the mode of execution suggested in the order under appeal. The provisions of S. 136, Civil P. C., and S. 16, Act 5 of 1871, require consideration. It may be that the proper mode of execution is for this Court to cause Ram Prasad Singh to be arrested and then to commit him to the civil jail in this place. This question is at present immaterial.

(c) Finally it is contended that under the rules of this Court, no single Judge has authority to deal with an application for an injunction as such. No such point was taken before the single Judge whose order is under appeal. If it had been we have no doubt he would have carefully considered whether, in order to give full effect to the spirit rather than to the letter of the rules, he would not allow Ram Prasad Singh an opportunity of arguing his case before a Bench of two Judges. Technically the plea has no force because the Benares Bank had not applied for the issue of an injunction. We are satisfied that the learned Judge of this Court had jurisdiction in the matter, that his order was in effect to one partly granting an application of Ram Prasad Singh's subject to a condition, and that he had jurisdiction to impose that condition.

We therefore dismiss this appeal with costs, including fees on the higher scale, but we do so with the remark that, while we affirm the order for Ram Prasad Singh's detention in a civil jail, we leave open the question as to the manner of execution of the said order.

V.B. R.K.

Appeal dismissed.

(2) [1909] 36 Cal. 233=1 I. C. 927.

(1) [1907] 34 Cal. 101.

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TUDBALL AND RYVES, JJ.

Raghunath—Plaintiff—Appellant.

v.

Ganesh and others—Defendants—Respondents.

First Appeal No. 35 of 1919, Decided on 27th November 1919, from order of Sub-Judge, Banda, D/- 19th December 1918.

Agra Tenancy Act (3 of 1901), S. 202—Suit for ejectment of trespasser lies in civil Court—If defendant pleads tenancy, provisions of S. 202 should be followed.

A suit in which the plaintiff seeks to eject the defendant on the ground that he is a trespasser and not a tenant, is cognizable by a civil Court and not by a Revenue Court. If in such a suit the defendant pleads that he is a tenant of the plaintiff, the procedure laid down in S. 202, Agra Tenancy Act, should be followed.

[P 24 C 1]

Pearey Lal Banerji—for Appellant.*Kailas Nath Katju*—for Respondents.

Judgment.—The facts of this appeal are as follows: The plaintiff is the owner of a two-anna share out of an eight-anna share in a certain village in the District of Hamirpur. His father died leaving him a minor and one Mt. Peari, apparently his mother, looked after his affairs. She mortgaged his share. Subsequently proceedings were taken under the Encumbered Estates Act, Bundelkhand. The creditor was paid off by Government and Mt. Peari proceeded to repay Government by instalments. After she had paid up a part of the debt she died. Another sarbarahkar was appointed in her place and then the owners of the eight-anna share gave a zarpeshgi lease to the defendants-respondents before us of the whole eight-annas. The plaintiff's sarbarahkar was a party to this lease. The plaintiff has now come of age and he has brought the present suit to eject the defendants-respondents from his two-anna share and to obtain possession thereof for himself. An examination of the plaint will show that he has treated the transaction, under which the defendants obtained possession, as a lease. He has alleged however that his sarbarahkar Toraiyan had no power whatsoever to grant a lease of his property or to transfer it in any way. He therefore pleads that the lease is not binding upon him and he seeks to eject the defendants as trespassers on the property. The suit was instituted in the Court of the Munsif at Hamirpur. The defendants' written

statement may be boiled down to this. First of all, that the sarbarahkar had full power to grant the lease, and secondly, that even if he had not, still the plaintiff on coming of age had confirmed the lease and had accepted rent under it; though in definite terms the defendants did not plead that they were the plaintiff's tenants, yet the whole sum and substance of their defence is that they are his tenants and furthermore they clearly plead that the suit was not cognizable by the civil Court but was cognizable only by the Revenue Court. The Court of first instance held that the suit was not cognizable by a civil Court but instead of returning the plaint to be filed in the proper Court, it dismissed the suit. From this decree the plaintiff filed an appeal as he was fully entitled to do. He urged in the grounds of appeal that the suit as it stood was cognizable by a civil Court and should have been entertained by the Munsif. At the time that the appeal was argued it was further urged that even if the Munsif's decision was a correct one, his decree dismissing the suit was bad and the plaint should be returned for presentation to the proper Court. The appellate Court agreed with the Munsif that the suit was not cognizable by the civil Court. It agreed with the appellant that the Munsif ought to have returned the plaint and not to have dismissed the suit; and accepting this contention, it ordered the plaint to be returned to the plaintiff. The plaintiff has come here on appeal from this order. A preliminary objection was taken that no appeal would lie from the order of the Court below on the ground that if the Court of first instance had done its duty and passed a proper order, no second appeal could have lain against an order passed by the lower appellate Court on appeal from the Munsif's order.

We do not think that there is any substance in this point, as we have to take the facts as they are and not as they ought to have been, and the case is very similar to that of *Behari Lal v. Khub Chand* (1). We must come to the merits of the appeal. In substance the plaint is an allegation by the plaintiff that the defendants are not his tenants. He distinctly pleads that they are trespassers and that he seeks to eject them. On the plaint, as it stands, we do not

(1) [1884] 6 All. 48.

think that the suit could have been instituted in the Revenue Court. Neither S. 58 nor S. 34, Tenancy Act, to which we have been referred, will enable the plaintiff to file his present plaint in the Revenue Court and claim to have a decision on it. We have not been referred to any other section of the Tenancy Act which would enable him to bring this suit under that Act. In substance the defendants' plea is that they are the tenants of the plaintiff under the lease in question and that it is a valid and binding transaction. It seems to us therefore quite clear that in these circumstances the civil Court ought to have entertained the suit and ought to have taken action under S. 202, Tenancy Act, and the question of the defendants' tenancy would then really be decided by a Revenue Court. The Courts below have merely erred in the procedure adopted by them, but still the procedure laid down by law must be followed.

It must be noted that there has been no previous litigation between the parties either in the Revenue or Civil Court in respect of the matter in dispute in this suit. The rulings in *Ram Singh v. Girraj Singh* (2) and *Sher Khan v. Debi Prasad* (3) do not apply to the present case, for in each of the suits with which those decisions are concerned, there was (in the end at least) an admitted tenancy and the plaintiffs were merely making an attempt to get round a decision of the Revenue Court already passed. In this view we allow the appeal. We set aside the orders and the decrees of the Courts below. We direct that the record be returned to the Court of first instance through the lower appellate Court with directions to re-admit the suit on its original number and to proceed to hear and decide it according to law, keeping in view our remarks in respect of the use of S. 202, Tenancy Act. Costs of this appeal as well as the costs so far incurred up to the present date by the parties in all Courts will abide the result of the suit.

V.B. R.K.

Appeal allowed.

(2) A. I. R. 1911 All. 483=37 All. 41=26 I. C. 731.

(3) A. I. R. 1915 All. 84=37 All. 254=28 I. C. 552.

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MEARS, C. J. AND BANERJI, J.

Kifayat Ullah Khan — Defendant—Appellant.

v.

Sri Raghunathji of Rajgopal Mandir of Ajudhia and others — Plaintiffs and Defendant—Respondents.

First Appeal No. 145 of 1915, Decided on 19th December 1919, from decision of Sub-Judge, Shahjahanpur, D/- 27th February 1915.

(a) **Transfer of Property Act (4 of 1882), S. 59—Presence of attesting witnesses at execution is sufficient.**

The fact that the attesting witnesses were present when a document was executed is a sufficient compliance with the provisions of S. 59.

[P 25 C 1]

(b) **Lease — Construction — Covenant to furnish security within specified time—Execution of lease made on different dates—Surety furnished within period from last execution held sufficient—Clause held could be waived at option of lessor.**

A lease, dated 7th December 1907, was executed by three out of four lessees on 9th December 1907. The fourth lessee executed the lease on 18th December 1907. Among other things, the lease contained a clause for the furnishing of security by the lessees within 15 days. A security bond was given on 23rd December 1907. The surety sought to escape from his liability under the bond on the ground that the time limit fixed by the lease for furnishing security had run out before 23rd December 1907 :

Held : (1) that as between the lessor and lessees the lease was made a complete and valid document on 8th December 1907, and that consequently time had not run out on the date of the security bond, and the surety was liable under it ; (2) that, in any case, the clause in the lease fixing the time for giving security was a clause solely for the benefit of the lessor, and was capable of being waived and was in fact waived.

[P 25 C 1, 2]

B. E. O'Connor—for Appellant.*Motilal Nehru* for *Tej Bahadur Sapru*—for Respondents.

Judgment.—This is an appeal by defendant 5. He and defendant 6 in the Court below were alleged by the plaintiff to have signed a security bond for the due performance by defendants 1—4 of certain covenants in a lease. Defendant 5 is the only appellant before this Court and he seeks to escape liability on two grounds : First, whilst not denying that the signature on the document is in fact his signature, he takes, as he is entitled to do, the legal objection that that document is not in law binding on him inasmuch as the provisions of S. 59, T. P. Act, were not complied with; the second ground that he takes is this :

that there was in the lease a time limit of 15 days and that time limit had run off before 23rd December 1907, the day on which the security bond was executed. Now this is a matter that can be disposed of very shortly. The first point that the mortgage was not duly executed and attested is sought to be proved by the appellant, who must have known very well when the case came on before the lower Court that the three attesting witnesses had a surprise in store for the plaintiff who called them. Each of them said that he had been a party to a transaction of an unusual character—each of them had signed his name on the document, there being on the right hand of that document a vacant space for the subsequent signatures of defendants 5 and 6. The learned Subordinate Judge did not accept that story and we do not accept it, and we are influenced by the inherent improbability of the story, and by the admission of one of the witnesses (witness 4) that though he did not remember very much about the whole matter, he could not recollect that there was anything extraordinary about the execution of this document. We need hardly say we do not place entire reliance on Subadar Singh in every detail, but substantially we believe that the attesting witnesses were present when this defendant executed the document. That being so, S. 59, T. P. Act was complied with and we decide that point against the appellant.

There now remains the other contention based upon the 15 days' time limit. The counterpart of the lease, dated 7th December 1907, was executed by three lessees and registered on 9th December, but it was not until 18th December that the fourth lessee (who was quite as essential a party as any of the other three) executed the lease and thereby, as we hold, made it on that day (18th December) a complete and perfect document as between lessor and lessee. Now the security bond was dated 23rd December, and though the lease did contain a provision

"that if we fail to furnish security within the time fixed, then this lease shall be deemed to be null and void;"

nevertheless on 23rd December, the security bond was given and the possession, which had been withheld by the lessor, was by virtue of the security (which he

obtained from the defendant-appellant and defendant 6) was delivered to the lessees. No point was raised at all by any party that the lease was not a valid document and we think that the clause as regards the 15 days was a clause capable of waiver and was in fact waived. Indeed, it might very well have been construed to have been a clause solely for the benefit of the lessor. In those circumstances we are of opinion that there was no running out of time by 23rd December, and that the security bond became as of full force against the defendant-appellant and that he is liable to perform the obligations that he entered into under it. Under these circumstances we dismiss the appeal with costs including fees on the higher scale. We extend the time for payment of the mortgage money for six months from this date.

V.B./R K.

Appeal dismissed.

A. I. R. 1919 Allahabad 25

PIGGOTT AND DALAL, JJ.

In the matter of *National Insurance and Banking Company, Ltd.*

Civil Misc. No. 427 of 1919, Decided on 6th November 1919.

Companies Act (7 of 1913), Ss. 164 and 200—Winding up order passed by Punjab Chief Court—District Judge under S. 164 took up subsequent proceedings—Action against contributories in jurisdiction of Allahabad High Court—Allahabad Court can enforce the orders in execution proceedings before itself.

An order for the winding up of a company was made by the Punjab Chief Court and under S. 164, Companies Act, subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court. On an application to the Allahabad High Court by the Official Liquidator to enforce these orders:

Held: that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself, or to authorize the Official Liquidator to apply to the various District Courts in respect of each of the persons against whom orders for contribution had been passed; and that as the balance of convenience was in favour of the latter course, the Official Liquidator was authorized to proceed accordingly. [P 26 C 1]

Judgment.—This is an application by the Official Liquidator of the National Insurance and Banking Company, Ltd., which is now in liquidation. The winding up order was made by the Chief Court of the Punjab, and under S. 164, Companies Act 7 of 1913, proceedings subsequent to that order are now being had in the Court of the District Judge of Lahore. According to this petition, which

is supported by affidavit, the District Judge of Lahore has passed a number of orders against contributories residing at various places within the jurisdiction of this Court. The prayer in this application is that this Court should make an order under S. 164 aforesaid, permitting these subsequent proceedings to be had in the various District Courts specified at the foot of the application. Under S. 200, Act 7 of 1913, the orders made by the District Judge of Lahore require to be enforced by the Court which would have had jurisdiction in respect of the company concerned if the registered office of that company had been situated at the places where execution is sought. Under S. 3 of the Act, the Court having jurisdiction at the various places specified at the foot of the plaint is this High Court. Referring back however to S. 200 we find that this Court has authority to enforce the orders of the District Judge of Lahore in the same manner and in all respects as if these orders had been made by this Court itself.

If the orders in question had been made by this Court itself, we could undoubtedly direct under S. 164, Act 7 of 1913, that subsequent proceedings be had in a District Court. It is therefore merely a question of convenience whether the proceedings in execution should all be had in this Court, or whether the Official Liquidator should be authorized to apply to the various District Courts specified at the foot of his application in respect of each of the persons against whom orders for contribution have been passed by the District Judge of Lahore. The balance of convenience is obviously in favour of allowing proceedings to be taken in the District Courts. Our order therefore under the sections to which reference has been made, is that proceedings to enforce the orders passed by the District Judge of Lahore may be instituted on the application of the Official Liquidator, and the aforesaid orders may be enforced according to the tenure in the Courts of the various District Judges specified at the foot of this application and shown in the margin (foot note)* of this order; proceedings in each Court being taken according to the place of residence of the person against whom orders for

contribution have been made, or according to the situation of the property against which execution is sought.

V.B./R.K.

Order accordingly.

A. I. R. 1919 Allahabad 26

PIGGOTT, J.

Babu Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No 293 of 1919, Decided on 24th June 1919, against order of Sess. Judge, Bareilly, D/- 15th April 1919.

Criminal P. C. (5 of 1898), Ss. 234, 235 and 476—Accused filing two suits—In prosecution sanctioned by Court, Magistrate framing charges of offences under S. 209 against accused in both suits—Other persons charged with different offence of S. 193, I. P. C., tried jointly—No objection raised—After conviction objection about this irregularity of joining charges arising out of two separate suits raised in appeal—Irregularity held curable under Criminal P. C., S. 537.

Accused instituted two suits against two different persons in two different Courts, one in the Court of the City Munsif and the other in the Court of the Subordinate Judge. Both suits were tried on the small cause side and dismissed. The Sub-Judge directed under S. 476, Criminal P. C., the prosecution of the accused under S. 209, I. P. C., and of three other persons under S. 193, of the same Code. The Magistrate taking cognizance of the case framed charges against the accused in respect of both the suits, and the accused entered upon his defence. Evidence was recorded for both prosecution and defence without any objection to the jurisdiction of the Magistrate to take cognizance of the offences, or as to the validity of the procedure adopted in trying both charges at one and the same trial. After he was convicted, the accused appealed to the Sessions Judge protesting against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed in respect of the suit filed in the Court of the City Munsif, urging that he had been taken by surprise at the course adopted by the Magistrate, as he believed he was on his trial for the offence in respect of the suit in the Court of the Sub-Judge, and was greatly prejudiced in his defence by this belief. The Sessions Judge declined to interfere and the accused moved the High Court in revision:

Held: that the case was covered by S. 537 (b), as the accused who had every opportunity of doing so and who had full warning from the date on which the charge was framed of the fact that he was being put upon his trial in respect of both offences, had acquiesced in the view taken by the Magistrate and had never at any stage of the trial in that Court raised the question of the Court's jurisdiction in respect of the offence alleged to have been committed in the City Munsif's Court; that at most the Magistrate had committed an error, but the error had not in any way prejudiced the accused by the procedure adopted. [P 28 C 2]

J. N. Misra—for Applicant.

Asst. Govt. Advocate—for the Crown.

* Allahabad, Benares, Badaun, Ghazipur, Mirzapur, Aligarh, Bulandshahr, Etah, Hamirpur, Muradabad, Mainpuri and Muttra.

Judgment.—This application in revision arises out of the following facts.: On 6th April 1918 the applicant Babu Ram instituted two civil suits in two different Courts against two different persons. In one case he claimed a sum of Rs. 33-10-0 from one Badri Prasad. This suit was instituted in the Court of the City Munsif of Bareilly, was tried on the Small Cause Court side, and was dismissed on 23rd April 1918. In the other suit Babu Ram claimed a sum of Rs. 140 from one Mt. Ganga Dei in the Court of the Subordinate Judge of Bareilly. This suit also was tried on the small cause side and was also dismissed. The learned Subordinate Judge then took proceedings under S. 476, Criminal P. C., against Babu Ram and against certain persons who had appeared as witnesses before his Court in support of Babu Ram's claim against Mt. Ganga Dei. In the course of those proceedings he sent for and examined the file of the suit against Badri Prasad in the City Munsif's Court. On 1st June 1918, he recorded an order directing the prosecution of Babu Ram under S. 209, I. P. C., and of three other persons under S. 193 of the same Code. The Magistrate who took cognizance of the matter inquired into the conduct of Babu Ram in respect of both the suits filed by him. He framed charges alleging against Babu Ram that he had fraudulently or dishonestly, or with intent to injure Badri Prasad and Mt. Ganga Dei, made against each of them on one and the same day, a claim in two different Courts of justice which he knew to be false. After the charges had been framed Babu Ram entered on his defence.

The prosecution witnesses were recalled and cross-examined and witnesses for the defence were heard on three subsequent dates, the last of which was one month and 11 days after the framing of the charges. It is quite clear that in the Magistrate's Court no objection was taken as to the jurisdiction of the Court to take cognizance of both offences, or as to the validity of the procedure adopted in trying both these charges at one and the same trial. It was an essential part of the case for the prosecution that these two false claims had been preferred by Babu Ram out of enmity against Badri Prasad, his reason for proceeding against Mt. Ganga Dei being that that lady is related to Badri Prasad and lives in one and the

same house with him. So far therefore as concerns the trial of these two charges together, the procedure adopted is not merely warranted by S. 234, Criminal P. C., but the case actually falls within the purview of S. 235 (1) of the same Code, the case for the prosecution being that the bringing of two false claims against Badri Prasad and Mt. Ganga Dei respectively formed part of the same transaction. The trying Magistrate, and also the Sessions Judge on appeal, have found that the case for the prosecution was fully made out on the facts, that the two claims preferred by Babu Ram were false to his knowledge, and were preferred dishonestly and with intent to injure Badri Prasad and Mt. Ganga Dei. In his memorandum of appeal to the Sessions Court Babu Ram protested against the joinder of the two charges, and also against the action of the Magistrate in taking cognizance of the offence alleged to have been committed by the filing of the false claim against Badri Prasad in the Court of the City Munsif. He has stated in the said petition of appeal that he was taken by surprise by the course adopted by the Magistrate, that he believed himself to be on his trial only in respect of the claim brought against Mt. Ganga Dei and that he was greatly prejudiced in his defence by this belief. An examination of the record shows that these assertions are absolutely false. Babu Ram had fair warning that he was charged in respect of both offences. He did in fact defend himself in respect of both charges.

He had abundant opportunity of doing so, and he never in the Magistrate's Court challenged the legality or propriety of the procedure adopted. The learned Sessions Judge, concurring with the view taken of the fact by the Magistrate, has declined to interfere on any legal ground, holding that the joinder of charges was justified, that if any error was committed in respect of the Magistrate's taking cognizance of the offence alleged to have been committed in respect of the filing of the suit in the City Munsif's Court, the accused had not been prejudiced thereby and that the provisions of S. 537 (b), Criminal P. C., more particularly when considered in connexion with the explanation appended to the aforesaid section, forbid interference on appeal or revision on the mere ground

of want of sanction in respect of this particular offence, or of irregularity in the proceedings taken under S. 476 by the learned Subordinate Judge.

In the petition of revision to this Court these points are again raised. I have to consider, first of all, whether the learned Subordinate Judge had jurisdiction to take proceedings in respect of the false claim alleged to have been preferred in the City Munsif's Court. My answer on this point is that on the materials at present available I am unable to answer this question positively either in the affirmative or in the negative. If it was made a part of Mt. Ganga Dei's defence in the suit before the learned Subordinate Judge that the preferring of this false claim against her was part of a conspiracy, another step in which had been the filing of a false claim against Badri Prasad in the City Munsif's Court, and if in consequence the learned Subordinate Judge sent for and examined the record of the trial in the City Munsif's Court, and if, in fact, the question of the false claim preferred against Badri Prasad was brought to his notice in the course of a judicial proceeding, that is to say, in the course of his trial of the claim brought against Mt. Ganga Dei, then he had jurisdiction to direct the prosecution of Babu Ram for having preferred the false claim against Badri Prasad in the City Munsif's Court, as well as for having preferred a false claim against Mt. Ganga Dei in his own Court. If I thought it essential in the interests of justice to do so, I should adjourn the present proceedings in order to call for the record of the suit No. 320 of 1918, on the Small Cause Court side, in the Court of the Subordinate Judge of Bareilly, in order to inquire further into these matters. For reasons which will become sufficiently obvious in the course of this order I do not think this necessary. If this were the only point to be determined on this application, I should be perfectly justified in holding that the order passed by the learned Subordinate Judge under S. 476, Criminal P. C., must be presumed to be a good and valid order, unless and until the applicant can satisfy this Court to the contrary. A more serious difficulty has however been raised in respect of the same order. It is undoubtedly ambiguous in its terms and lays itself open to the contention that the

learned Subordinate Judge, although he had examined the file of the suit in the City Munsif's Court in order to form a sound opinion regarding the transaction as a whole, did not, as a matter of fact, intend to direct the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's Court, but only in respect of the claim preferred against Mt. Ganga Dei in his own Court. I am not preferred to go further than to say that the order of the learned Subordinate Judge of 1st June 1918, is ambiguous, and does not make it as clear as it should do whether he intended to direct the prosecution of Babu Ram in respect of two offences under S. 209, I. P. C., or of one only.

Now I am content to deal with the matter upon this basis. I take it that the Magistrate who tried Babu Ram on these two charges had before him an ambiguously worded order, as to which it can fairly be contended that it does not make it clear whether the prosecution of Babu Ram in respect of the claim preferred in the City Munsif's Court is or is not ordered. I take it that the Magistrate in all good faith believed that the order of 1st June 1918, directed Babu Ram's prosecution in respect of both offences. He acted upon that belief, and the accused, who had every opportunity of doing so, and who had full warning from the date on which the charge was framed of the fact that he was being put upon his trial in respect of both offences acquiesced in the view taken by the Magistrate and never at any stage of the trial in that Court raised the question of the Court's want of jurisdiction in respect of the offence alleged to have been committed in the City Munsif's Court. On this state of facts I am prepared to hold that the case is covered by the provisions of S. 537 (b), Criminal P. C. When all is said and done, the words which occur in that sub-section:

"the want of any sanction required by S. 195 or any irregularity in proceedings taken under S. 476",

must have some meaning; it is contrary to the canons of sound interpretation to press the words, "passed by a Court of competent jurisdiction," in the first part of the said section so as to make it impossible for the words quoted from sub-S. (b) to have any meaning at all, that is to say, to be applicable in any possible

case. I have before me a ruling of this Court on which I desire to found myself. It is the case of *Emperor v. Zahir Singh* (1) decided by Tudball, J. With regard to S. 537, Criminal P. C., the learned Judge remarks:

"The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding."

The present seems to me precisely such a case. The error, if it was an error, committed by the Magistrate in the present case, was in interpreting the Subordinate Judge's order of 1st June 1918, as covering both the offences under S. 209, I. P. C., to which reference is made in the course of the said order. The error, if it was one, certainly escaped observation, not merely at the beginning of the proceeding in the Magistrate's Court, but throughout the entire trial in that Court. I am satisfied that in no event could it be said that Babu Ram was prejudiced by the procedure adopted. It was an essential part of the case for the prosecution that two false claims had been brought by Babu Ram, on one and the same date, in two different Courts, in pursuance of the same vengeful purpose; and that the bringing of those two false claims constituted two acts so connected together as to form part of one and the same transaction. Even if Babu Ram had been on his trial only in respect of the false claim preferred against Mt. Ganga Dei, the evidence given by Badri Prasad would have been relevant under more than one section of the Evidence Act.

The sentences passed in this case are rigorous imprisonment for one year and a fine of Rs. 100 on each charge. The sentences of imprisonment have been ordered to run concurrently, so that when all is said and done, the only practical effect of the trial of the two offences together is that Babu Ram is condemned to a fine of Rs. 200 instead of a fine of Rs. 100 only. While therefore I entertain no doubt in my own mind as to the correctness of the principles of law on the strength of which I have decided to dismiss this application, I am prepared in view of the somewhat complex nature of the questions of law raised to take into consideration the question of sentence.

(1) A. I. R. 1915 All. 110=37 All. 283=28 I. C. 646.

There is no clear evidence on the record as to the means of Babu Ram; but I am disposed to infer that his position in life is such as to make the payment of a fine of Rs. 200 a somewhat serious matter for him. Moreover, if it is permissible to look at the matter from a somewhat technical point of view, it may be said that the false claim against Mt. Ganga Dei was for a considerably larger amount and constituted a more serious offence than the bringing of the false claim against Badri Prasad, so that some distinction might be made between the two in the matter of the sentence. My order therefore is this: that as a question of law I affirm the conviction of Babu Ram in respect of both the offences of which he has been tried and convicted; but for the reasons given, I reduce the sentence passed upon him in the matter of the second offence charged, that is to say, the false claim brought against Badri Prasad in the Court of the City Munsif, and I do so by setting aside the sentence of fine passed in respect of the conviction on that charge. The net result is that Babu Ram remains liable to two concurrent sentences of rigorous imprisonment amounting to one year in all, and to a single fine of Rs. 100, with an alternative period of rigorous imprisonment. I understand that Babu Ram has been released on bail. If so he must surrender to his bail to undergo the unexpired portion of his sentence. If the full fine of Rs. 200 has been paid then one-half of it, that is to say Rs. 100, will be refunded.

V.B./R.K.

Sentence reduced.

A. I. R 1919 Allahabad 29

KNOX, J.

Sital Pande—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. No. 216 of 1919, Decided on 10th December 1919.

Criminal P. C. (1898), S. 526—Magistrate displeased—It is no ground for transfer.

The fact that a Magistrate by his attitude shows that he is displeased with an accused person is not a sufficient ground for transferring a case. [P 30 C 2]

Harnandan Prasad—for Applicant.

Gort. Advocate—for the Crown.

Judgment.—This is an application for transfer of what is called Criminal Case No. 177-11 of 1919 from the Court of a Magistrate of the First Class of

Basti to that to any other Magistrate in the district. The application is supported by an affidavit. It is alleged in the so-called affidavit that the Magistrate, without hearing any of the applicant's witnesses and without any case being instituted under S. 107, Criminal P. C., has called upon the applicant to show cause why he should not be required to file a personal bond in the sum of Rs. 1,000 with two sureties in the sum of Rs. 500 each, but the other side have been required by the said Court to show cause why they should not be required to file a personal bond for Rs. 500 each with two sureties in the sum of Rs. 250 each for one year. The applicant proceeds to say that this Magistrate has, on various occasions, shown by his attitude that he is displeased with the applicant and many times when he has gone to file some applications he has turned the applicant out of Court and refused to receive his applications and threatened to send the applicant to jail. That, on three occasions, dates specified, the applicant made applications before the aforesaid Magistrate but he refused to take them. That the Magistrate has been threatening to send the applicant to jail and has been expressing his displeasure in various ways—such ways are not specified—and has started proceedings against the applicant under S. 107, Criminal P. C. I understand then by this application that what the applicant wants transferred is the requisition of the Magistrate under S. 107, Criminal P. C. that the applicant shall show cause why he should not be ordered to execute a bond for keeping the the peace. Now, the only person who can deal with proceedings of this kind, [S. 107, Cl. 2, are proceedings where the person informed against (apparently the applicant in the present case) or the place where breach of the peace is apprehended is within the local limits of such Magistrate's jurisdiction] is the Magistrate within the local limits of whose jurisdiction the applicant resides. In the argument addressed to me I have been more than once informed that the Magistrate who issued the requisition is the Subdivisional Magistrate. I have not been informed either by the affidavit or elsewhere that there is any other Magistrate who has jurisdiction in this subdivision except the Magistrate who has issued the requisition, and I also

doubt very much indeed whether under S. 526, Criminal P. C., I have power to transfer this proceeding.

It is not an inquiry and it is not a trial. There is no offence. What the Magistrate appears to be intending is to prevent an offence being committed within his jurisdiction. But, over and above these two objections which appear, on the face of the proceeding, sufficient cause has not been shown to me that a fair and impartial enquiry or trial cannot be had before this First Class Magistrate. It seems to me, after hearing the argument, that the applicant has been offended by certain applications of his having been returned to him and from the Magistrate's refusal to receive applications he apprehends that the Magistrate is displeased with him and that the matter will not be impartially inquired into. The learned vakil who appeared for the applicant put forward what he says were explanations furnished by the Magistrate concerned. How the said vakil got hold of these I do not know; but I do not think that the matter specified in the affidavit amounts to more than exaggerated language. For all these reasons I am not prepared to order a transfer. The application is dismissed. I am informed by the learned vakil that he is in possession of a certified copy of the Magistrate's explanation.

V.B./R.K. *Application dismissed.*

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TUDBALL AND RYVES, JJ.

Mahesh Prasad Singh—Petitioner — Appellant.

v.

Mt. Budhwanti—Opposite Party—Respondent.

First Appeal No. 56 of 1919, Decided on 28th November 1919, from order of Sub-Judge, Mirzapur, D/- 7th March 1919.

Civil P. C. (5 of 1908), S. 152—Appeal.

There is no appeal from an order passed under S. 152. [P 31 C 1]

S. N. Sen and *J. N. Misra*—for Appellant.

H. K. Mukerjee and *S. C. Chaudhuri*—for Respondent.

Judgment.—A preliminary objection is taken that no appeal lies. The facts may be briefly stated. A decree was passed and put into execution. That decree had been confirmed on appeal in this Court. The respondents discovered an

error in the decree by reason of which they had been deprived of property in execution, to which they were on the face of the judgment entitled. They applied to the Court below for amendment of the decree. Objections were taken. The Court granted the application and amended the decree. Another application after the amendment was made for restitution. That is the subject-matter of a connected appeal. But in this appeal it is urged that no appeal lies from an order passed under S. 152, Civil P. C. The truth and the force of this contention are practically admitted and the Code is perfectly clear on the subject that no appeal lies. We are asked to treat the appeal as an application in revision, but this we must decline to do for admittedly there are no merits whatsoever in the appellant's case. The error in the decree was admittedly there and justice has been done, and we see no ground whatsoever to accede to this request. The result is that the appeal is rejected with costs to the opposite party including fees on the higher scale to the extent of Rs. 62-8-0.

V.B./R. K.

*Appeal rejected.***A. I. R. 1919 Allahabad 31 (1)**

PIGGOTT, J.

Emperor

v.

Julua and another—Opposite Parties.

Criminal Ref. No. 307 of 1919, Decided on 1st December 1919, made by Sess. Judge, Cawnpore, D/- 5th November 1919.

Criminal P. C. (5 of 1898), Ss. 345 and 248—Offence under S. 24, Cattle Trespass Act joined with offence under S. 323, I. P. C.—Latter compounded—Former offence should be deemed to be withdrawn—Cattle Trespass Act (1 of 1887), S. 24.

An offence under S. 24, Cattle Trespass Act, is not compoundable; but where that offence is charged along with an offence under S. 323, I. P. C., and the parties effect a compromise in respect of the latter offence, the Magistrate is entitled to deal with the compromise as a withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act, for if no evidence were forthcoming on which to convict an order of acquittal would result. [P 31 C 2]

Judgment.—The order of the learned Sessions Judge has been carelessly drafted. The reference to Ss. 21 and 30, Cattle Trespass Act (1 of 1871) are incorrect and have caused me some trouble. The actual complaint before the Magistrate was one of causing hurt coupled with the forcible rescue of cattle punishable under

S. 24, Act 1 of 1871. So far as the particular matter under reference is concerned I have come to the conclusion that the Magistrate, although his procedure may not have been perfectly regular was substantially right and that the interference of this Court is not called for. The learned Sessions Judge is of course right in pointing out that an offence under S. 24, Act 1 of 1871, is not compoundable under S. 345, Criminal P. C. A case under that section would however be a summons case and would result in an order of acquittal if no evidence were produced on which the Court could find the accused guilty. In the present case the complainant entered into a compromise with the two accused Julua and Mulua in respect of whom this reference has been made. The compromise involved the compounding of the offence of causing simple hurt under S. 323, I. P. C., and the Magistrate was entitled to deal with it as a withdrawal of the complaint in respect of the alleged offence under the Cattle Trespass Act. Limiting himself to a consideration of that offence only he had jurisdiction to acquit the accused under the provisions of S. 248, Criminal P. C., if he saw sufficient reason for doing so. I am not disposed to interfere, and I order that the record be returned.

V.B./R.K.

*Recommendation not accepted.***A. I. R. 1919 Allahabad 31 (2)**

MEARS, C. J. AND BANERJI, J.

Mahomed Sajjad Ali Khan and others—Defendants—Applicants.

v.

Mahomed Ishaq Khan and others—Plaintiffs—Opposite Parties.

Privy Council Appeal No. 8 of 1918, Decided on 22nd November 1919, for leave to appeal to His Majesty in Council. **Civil P. C. (1908), S. 109—Appeal under S. 109 against interlocutory orders should be allowed only when it will end litigation.**

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties.

[P 32 C 2]

S. C. Mukerji—for Applicants.

K. N. Katju—for Opposite Parties.

Judgment.—This is an application by the parties who were defendants in the Court of the Subordinate Judge for leave

to appeal to His Majesty in Council against a decision of this Court, dated 9th January 1918. It appears that an action was commenced on 3rd July 1915 for the recovery of mesne profits and when that action came on, the defendants took as their first point that, this action, was barred by reason of there having been a previous action between the same parties, and they relied upon S. 11, Expl. 5, Civil P. C. They succeeded in persuading the learned Subordinate Judge that he ought to regard the claim as falling within the principle of res judicata. In that way the plaintiffs' action came to a sudden termination. Thereupon the plaintiffs moved the High Court, and on the appeal it was held that the claim was not barred by reason of the previous action and the case was remanded for the decision of the Subordinate Judge. The result of the High Court decision was of course, to place the parties exactly as they were when first the case was opened before the lower Court with the exception that the issue of res judicata was settled in the plaintiffs' favour. The defendants now apply for leave to take this point on appeal to the Privy Council. Now a reference to the pleading shows that res judicata was only one of several issues put forward by the defendants. They contend, for instance, that the claim for mesne profits for the years 1912 and 1913 is barred by lapse of time, that the suit is not cognizable by the learned Subordinate Judge but is a matter within the province of the Revenue Court. There are other matters of substance which must be dealt with, involving much more than mere arithmetical calculations or perfunctory apportionment of liability amongst the defendants. In these circumstances it remains to be seen what are the principles which should govern an application of this kind. The application is based upon S. 109, Civil P. C., and turns upon the meaning to be given to a "final decree" in that section. Now the question, under varying circumstances, has been frequently litigated and, if ever a point of law can fairly be said to be crystallized, it would seem that the time has arrived when it can be said that this matter is demonstrated clearly and definitely in a consistent series of decisions.

The defendants' counsel quite naturally drew our attention to *Sainil Muzhar*

Hossein v. Mt. Bodha Bibi (1) and if he could have shown us that a decision on the res judicata point would in any event have settled the rights of the parties except as to mere mechanical working out of the decree we should have granted the defendants a certificate and allowed the appeal to go to the Privy Council. A decision of the Privy Council affirming that of the High Court would however leave the various issues above referred to, still in contention between the parties. The plaintiffs' counsel, who opposed the application referred us to several cases beginning with that of *Kausella v. Ram Sarup* (2), *Ahmad Husain v. Gobind Krishna Narain* (3), *Nuri Mian v. Ganges Sugar Works Limited, Cawnpore* (4) and finally the case of *Danby v. Tafazul Husain* (5). Now in each of those authorities there was a decision on some one point, just as in the case now under consideration there was a decision that the claim was barred but there were also outstanding points of considerable importance and of such a character that it could not be said that in whichever way the decision of the Privy Council went, the matter would be concluded. All of these cases are conveniently grouped up in the Patna decision *Danby v. Tafazul Hussain* (5) and there is thus a uniform consensus of opinion that appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will practically put an end to the litigation and finally decide the rights of the parties. In this view it follows that the appeal must be rejected. We accordingly dismiss the application with costs, including fees on the higher scale.

V.B./R.K. *Application dismissed.*

- (1) [1895] 17 All. 112=22 I. A. 1=5 M. L. J. 20=6 Sar 580 (P. C.).
 (2) [1907] 5 A. L. J. 57=(1907) A. W. N. 291.
 (3) [1911] 33 All. 391=9 I. C. 932.
 (4) [1916] 38 All. 150=32 I. C. 360.
 (5) [1918] 45 I. C. 290.

A. I. R. 1919 Allahabad 32

STUART AND RYVES, JJ.

Rameshar Singh Sahib Bahadur —
 Plaintiff—Appellant.

v.

Munshi Madho Lal—Defendant—Respondent.

First Appeal No. 313 of 1916, Decided on 10th July 1919, from decision of Addl. Sub-Judge, Benares, D. 28th June 1916.

Agra Tenancy Act (2 of 1901), Ss. 4 (2), 19 and 58—Grantee planting grove—On grantee's death plaintiff admitted as tenant on yearly rent — Plaintiff no heir of grantee—In ejectment plaintiff contended that grove was no "land" and Revenue Court had no jurisdiction—Plaintiff held to be grove-holder non-occupancy tenant and could be ejected.

B, the grantee of some land, planted a grove thereon; after his death *D* was admitted as a tenant on payment of a yearly rent. He continued to pay this rent from 1899 till 1910 when the present defendant sued in the Revenue Court and obtained a decree for his ejectment, the Board of Revenue holding that though the grove in question was not "land" within the meaning of the Tenancy Act, a decree for ejectment could be given on the ground that *D* came in after the death of the original grantee, not as his heir and not under the same contract as would bind him and the original grantee but simply as a tenant paying rent from year to year. *D* thereupon brought the present suit to obtain a declaration that the decree of the Board of Revenue was illegal being one which the Revenue Courts had no jurisdiction to pass:

Held: that a grove-holder such as *D* was a non-occupancy tenant and the Revenue Courts had the power to eject him and that the decision of the Board of Revenue was in no way illegal.

[P 33 C 2]

S.N. Sen and N. Upadhyaya—for Appellant.

Sarat Chandra Chowdhri, L. M. Banerji and Kashi Narain Malvaya—for Respondent.

Judgment.—The present respondent gave some land to Swami Bishudha Nand, it is said some 56 years ago, to plant a grove. In 1899 the Swami died. Subsequently the Maharaja of Darbhanga was admitted as a tenant and paid the respondent Rs. 14 a year as rent. It appears that he was recorded in the revenue papers as a non-occupancy tenant. Be that as it may, he continued paying the rent up till the year 1910 when the respondent brought a suit to eject him under S. 58, Tenancy Act. In his reply to that suit the Maharaja of Darbhanga made two somewhat contradictory statements. In para. 2 of his written statement he stated that the holding was a grove pure and simple, and that he was merely managing it as a sort of shebait. In para. 3 he went on to say that inasmuch as he had been in charge and management of the property for over 12 years he had acquired a right of occupancy. Both the Assistant Collector and the Commissioner dismissed the suit holding that the defendant had proved himself to be an occupancy tenant. On revision to the Board of Revenue it was held that occupancy rights could only be acquired in "land"

and that the grove in question was not "land" within the meaning of the Act. It held that a decree for ejectment of the defendant could be given on the ground that, after the death of the Swami, the Raja of Darbhanga came in not as the heir of the Swami and therefore not under the same contract as would bind the defendant and the Swami, but that he simply came in as a tenant paying Rs. 14 year by year. The result was that the Raja of Darbhanga was ejected from the land. He then brought this suit for a declaration, for possession of the grove and mesne profits, on the ground that the defendant had no right to eject him and that the ruling of the Board of Revenue was illegal being one which the Revenue Courts had no jurisdiction to pass. There can be no doubt that such a grove-holder as the appellant is a tenant according to the definition in S. 4 of the Act. Next, it remains to be seen whether he is a non-occupancy tenant. S. 19, in which the word "land" does not find a place makes it quite clear that the appellant is a non-occupancy tenant. Therefore the Revenue Court had power to eject him. S. 58 lays down the conditions under which a non-occupancy tenant may be ejected and there is nothing in that section which seems to exclude such a grove-holder.

It is argued that S. 58 implies a suit for ejectment from land, the word "land" as defined in S. 4 (2) of the Act being land used for agricultural purposes. But there is no force in this argument. The section lays down how such a tenant is to be ejected from his tenancy. That tenancy need not necessarily be over land used for agricultural purposes. It seems to us therefore that the decision of the Board of Revenue was not only one which it had jurisdiction to pass but which was right. In this view it is unnecessary to consider the various rulings of this Court and also of the Board of Revenue which have been cited to us as our finding on this point concludes the appeal. The result is that the appeal fails and is dismissed with costs including in this Court, fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 34

MEARS, C. J. AND BANERJI, J.

Dirgpal Singh—Petitioner.

v.

Pahladi Lal and others—Opposite Parties.

Privy Council Appeal No. 13 of 1918, Decided on 24th November 1919, for leave to appeal to His Majesty in Council.

(a) Civil P. C. (1908), S. 109—Order of remand by High Court is not appealable unless it is final and involves some important question of law.

An appeal does not lie to the Privy Council as of right against an order of remand by the High Court, unless it is a final order within the meaning of S. 109 and the case is otherwise a fit one for appeal to His Majesty in Council involving a substantial question of law of general interest.

[P 34 C 2]

(b) Civil P. C. (5 of 1908), S. 109 and O. 45, R. 3—Mortgagor's fraud in representing to registration officer that some property was within its jurisdiction whether it would vitiate mortgage when mortgagee is innocent is question of general importance.

The question whether the fraud of a mortgagor alone in procuring the registration of the mortgage deed in a particular registration office, by representing that some portion of the mortgaged property was within the jurisdiction of that office, would vitiate the mortgage and disentitle the mortgagee, who was ignorant of the fraud, to enforce it, is a substantial question of law of general importance to satisfy the requirements of R. 3, O. 45.

[P 35 C 1]

Gulzari Lal—for Petitioner.

B. E. O'Connor—for Opposite Parties.

Judgment.—This is an application for leave to appeal to His Majesty in Council. The suit was one to enforce two simple mortgages. The present applicant, who is the purchaser of a part of the mortgaged property, contested the suit on the ground that the registration of the mortgages was invalid inasmuch as a part of the property comprised in the mortgage, which lay within the jurisdiction of the Sub-Registrar in whose office the mortgage deeds were registered, did not belong to the mortgagor and was never intended to be included in the mortgage. The Court below held that the registration of the document was invalid by reason of the fraud perpetrated on the registering officer. It relied for its decision upon the ruling of their Lordships of the Privy Council in the case of *Harendra Lal Roy Chowdhury v. Hari Dasi Debi* (1). Upon appeal to this Court the learned Judges of this Court found

that the mortgagor obtained registration of the document in the office of the Sub-Registrar of Budaun by perpetrating this fraud, that he got the Sub-Registrar to register the document whereas he had no interest in the property and he had not intended to mortgage it but had included it in the mortgage simply with the object of obtaining registration of it in the office of the Sub-Registrar of Budaun. They however found that in this fraud the mortgagee did not participate, inasmuch as the property was recorded in the revenue papers in the name of the mortgagor although under an arbitration award it had been allotted to the share of other members of the family to which the mortgagor belonged. The learned Judges held that as the mortgagee did not join in the fraud, the registration was not vitiated by reason of the fraud of the mortgagor.

They accordingly remanded the case to the Court below for trial of the other issues which arose in the case. From this order of remand the present application for leave to appeal to His Majesty has been preferred on two grounds. The first is that the order of remand was incorrect and the decision of the learned Judges of this Court was erroneous upon the question of fraud. The second ground is that even if no appeal lies from the order of remand, the case is otherwise a fit one for appeal to His Majesty in Council within the meaning of R. 3, O. 45, Civil P. C. We have recently held in the case of *Muhammad Sajjad Ali Khan v. Muhammad Ishaq Khan* (2) that an order of remand made under circumstances similar to those of the present case is not a final order within the meaning of S. 109, Civil P. C., and that an appeal does not lie as of right from that decision. We may mention that the value of the subject-matter of the suit and of the proposed appeal exceeds Rs. 10,000. The decision to which we have just now referred follows a long series of rulings of this Court and therefore we must hold that an appeal does not lie to His Majesty in Council in the present case from the order of remand to the Court below. We have next to consider whether the case is "otherwise a fit one" for appeal to His Majesty in Council. In order to justify us in certifying the case to be a fit one for appeal, we have to see whether the case involves a

(1) A. I. R. 1914 P. C. 67=41 Cal. 972=41 I. A. 910=23 I. C. 637 (P. C.).

(2) A. I. R. 1919 All. 31=54 I. C. 504.

substantial question of law and whether that question of law is one of general importance. In the Privy Council case to which the learned Judges of this Court have referred, it was held that if the property of which registration was obtained did not exist, or if it existed, and the mortgagor and the mortgagee joined together for the purpose of committing a fraud in the registration department and getting the property registered by a Sub-Registrar who should not have registered it, the registration would not be valid and the mortgagee would not be entitled to take the benefit of the document so registered as a valid document. That is not the case here. The question in the present case, as already pointed out, is whether the fraud of the mortgagor alone would vitiate registration and disentitle the mortgagee (who was ignorant of the mortgagor's fraud) to enforce the mortgage. This is clearly a substantial question of law. It does not appear to have been decided in any other case so far as we are aware and so far as cases have been cited to us. The question is one of first impression and being a substantial question of law, we should be justified in granting the application for leave to appeal if it is one of general importance. We are of opinion that the question is also one of general importance, as it frequently arises in cases similar to the present. We are therefore of opinion that this case is "otherwise a fit one" for appeal to His Majesty in Council and we so certify.

V.B./R.K.

*Order accordingly.***A. I. R. 1919 Allahabad 35**

RYVES, J.

Emperor

v.

Nurul Hasan—Opposite Party.

Criminal Ref. No. 375 of 1919, Decided on 3rd July 1919, made by Sess. Judge, Saharanpur, D/- 19th June 1919.

Police Act (5 of 1861), Ss. 9 and 29—Constable convicted under S. 29—Suspended during trial—On expiry of suspension reinstated and directed to appear and give notice under S. 9—Constable failing to comply with direction can be convicted again under S. 29 as second conviction was not for same offence.

Accused, a police constable, failed to return to duty on the expiry of leave which he had obtained. He was prosecuted under S. 29 and fined Rs. 30. During the pendency of this case he was placed under suspension, and on the conclusion thereof he was reinstated and directed to

appear in the police lines and there to give two months' notice as required by S. 9 of the Act if he did not wish to continue in the police force. He failed to comply with this order and was again prosecuted under S. 29 and sentenced to undergo imprisonment. The Sessions Judge recommended that the conviction and sentence be set aside on the ground that the accused's failure to return to duty was one single offence and he could not legally be again convicted merely because he still failed to return:

Held: that the second conviction was not for the same offence but for another similar offence the first conviction being for failure to return to duty after leave; and the second for failure to return after he had been reinstated. [P 36 C 1]

Judgment.—Nurul Hasan, police constable, failed to return to duty on the expiry of casual leave and was in consequence prosecuted under S. 29, Police Act, and, on conviction, was fined Rs. 30. This was on 17th January 1919. Pending that trial he had been suspended, but on 1st February 1919 the Superintendent of Police passed an order reinstating him and called upon him to return to duty. Orders were repeatedly sent to him to this effect, and it is admitted that in spite of these orders he failed to return to duty. In consequence he was prosecuted under S. 29, Police Act, for his failure to comply with the order of the Superintendent of Police dated 10th March 1919, directing him to appear in the police lines and there give a two months' notice as required under S. 9 of the Act. This order was so worded because Nurul Hasan had in the meantime sent in an application for leave to resign. This order was received by Nurul Hasan on 13th March 1919. He failed to comply with it and in consequence he was prosecuted again under S. 29 of the Act. The accused admitted the facts, but pleaded that as he had already been fined Rs. 30 for failure to return to duty, he was justified in disobeying subsequent orders calling him back to duty. The learned Magistrate convicted him and sentenced him to rigorous imprisonment for two months. The learned Sessions Judge of Saharanpur has referred the case to this Court, with a recommendation that the conviction and sentence be set aside on the ground that his failure to return to duty was one single offence. The Judge says:

"He withdrew from his duties without giving two months' notice and he has been punished;" and suggests that therefore he could not legally be again convicted, merely because he still failed to return to duty.

It seems to me that the accused has not been punished again for the same offence but for another similar offence. S. 9 of the Act provides that no police officer shall be at liberty to withdraw himself from the duties of his office except as provided in that section. At the first trial Nurul Hasan was punished for failure to return to duty after casual leave. On the second occasion he was prosecuted for failure to return to duty after he had been reinstated. These were two distinct and separate offences, though similar in character. It seems to me therefore that legally the conviction is right. At the same time I think under the circumstances of the case, a sentence of rigorous imprisonment for two months is perhaps unnecessarily severe. I reduce the sentence to one of one month's rigorous imprisonment from the date of his original sentence.

Let the record be returned.

V.B./R.K. *Sentence reduced.*

A. I. R. 1919 Allahabad 36

PIGGOTT AND DALAL, JJ.

Sital Prasad and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 857 of 1919, Decided on 17th November 1919, against order of Addl. Sess. Judge, Jaunpur, D/- 3rd July 1919.

(a) **Penal Code (45 of 1860), S. 361, Expl. 1—Person in temporary charge cannot prevail against lawful guardian.**

For the purposes of the first explanation to S. 361, a person in temporary charge of a minor cannot be regarded as the lawful guardian, as against the guardian at civil law. [P 37 C 2]

(b) **Penal Code (45 of 1860), S. 361—Nearest male member is not necessarily entitled to custody of minor girl under Hindu law.**

The fact that a person happens to be the nearest major male relative of a minor girl does not, under the Hindu law, give him an absolute right to the custody of the girl. [P 38 C 1]

*J. M. Banerji—*for Appellants.

*Govt. Pleader—*for the Crown.

Dalal, J.—Sital Prasad, Ram Sawarth and Ram Tawakka, Brahmins by caste, have appealed from their conviction of an offence under S. 366, I. P. C. The charge against them was one of kidnapping a minor girl, Mt. Rajpatia, eight years of age, from the custody of her lawful guardian, Mt. Chanderkali, in order to compel her to marry a person against her will. The willingness or otherwise of a minor Hindu girl to marry a particular person is not a matter for consideration at the

time of her marriage, so it will be difficult to make a distinction between a marriage by the agency of a kidnapper and marriage with the help of her relations so far as her own personal desire and consent are concerned. This however is a point of small significance, because in the event of the taking away of the girl being proved, the persons found guilty of kidnapping her would be guilty of an offence under S. 363, I. P. C., which provides for a substantial punishment. Mt. Rajpatia is a sister of Mt. Chanderkali's deceased husband Bikarmajit, and her father and the father of Ram Tawakkal, appellant, were own brothers. The fathers of both Mt. Rajpatia and Ram Tawakkal are dead.

There are two minor brothers of Mt. Rajpatia alive. The case for the prosecution was that the three appellants went to the apartment of Mt. Chanderkali on the night of 28th April last, picked up the minor girl Mt. Rajpatia who was sleeping by her aunt's side and ran away, that the appellants were pursued by the villagers, who caught the appellants Sital Prasad and Ram Sawarth, and that these two appellants were promptly taken to the police station at Bomniaon, where a report was made by Mt. Chanderkali at 7 a. m. on 29th April. It was said that Ram Tawakkal made good his escape and that the appellants put down or let go the hold of the minor girl when they were pursued and before they were caught at a short distance from the girl's house.

Ram Tawakkal surrendered himself in the Magistrate's Court on 14th May, when he presented to the Court a written statement charging the other appellants with the crime of kidnapping. This defence he subsequently abandoned for one in line with that of the other appellants. The other appellants, who are brothers and residents of Sirauli, a village at some distance from Pariat where Ram Tawakkal, the minor girl and Mt. Chanderkali lived, have throughout the proceedings put forward a consistent story. They stated that the girl's marriage was settled to take place with their younger brother Ram Prasad; that the agreement was entered into with Ram Tawakkal, who acted on behalf of Mt. Chanderkali, on a consideration of Rs. 200 to be paid to Mt. Chanderkali by these two appellants; that Rs. 100 had been previously paid to Mt. Chanderkali by the

hand of Ram Tawakkal, and that on 28th April in the afternoon these appellants went to the village of Pariat to the house of Mt. Chanderkali and Ram Tawakkal with the balance of the money to fetch the minor girl by way of a dola ceremony of marriage. They added that at the house further negotiations took place between them and Mt. Chanderkali on whose behalf the prosecution witness Ram Das was the spokesman at the time; that she demanded payment of an additional sum of Rs. 100 over and above the amount agreed upon between the parties and that on their refusal to submit to this exaction, a false charge of kidnapping was got up against them. I have read the evidence on the record and considered the circumstances of the alleged arrest of the appellants Sital Prasad and Ram Sawarath. I am satisfied that the prosecution story of the taking away of the girl is false. If the appellants had laid a plan for the carrying away of the girl, it is not likely that they would have been caught so easily after a short pursuit on a dark night. To all accounts the appellants had a good start, because the villagers first went to the house of Mt. Chanderkali, discovered from her in which direction the kidnappers had gone and then started in pursuit. The prosecution witness Jagerdeo made in the Committing Magistrate's Court an incredible statement that Sital Prasad appellant dragged the girl along as he ran as if a small child of six could not be carried by the appellants. It must be remembered that the appellants are all men of under 35 years of age.

The prosecution witness Sukhnandan deposed in the Court of the Committing Magistrate that Sital Prasad and Ram Sawarath appellants were caught with the girl. Obviously when the inquiry prior to commitment was proceeding, all the details of an imaginary occurrence were not settled and this conflict of testimony, subsequently removed in the Sessions Court, confirms me in my distrust of the prosecution story based on its improbability. It is probable that Ram Tawakkal may himself have desired a share in the money which was to be extorted from the other appellants. I am not concerned with that aspect of the case. What I believe is that the appellants Sital Prasad and Ram Sawarath have in the main told the truth. Mt.

Chanderkali is not without friends to help her. The prosecution witness Ram Das is a partisan of hers and the girl, Mt. Rajpatia has deposed that on the way to the police station they stopped at the house of a presumably influential man of the locality, Munshi Adya Saran. I hold that there was no taking away of the minor girl from the custody of Mt. Chanderkali.

The charge therefore fails and the appellants are entitled to an acquittal. A learned Judge of this Court referred this case to a Bench on a point of law raised by the appellants' learned counsel during argument. It was argued that Ram Tawakkal was the guardian of the girl under the law applicable to Hindus in this Province, and that therefore the taking away of the girl by him and his associates from the custody of Mt. Chanderkali did not amount to kidnapping as defined in S. 361, I. P. C. I would accept the inference of law under the Indian Penal Code, if Ram Tawakkal were proved to be the girl's guardian under the Hindu law.

The first explanation to S. 361, I. P. C., which defines lawful guardian, extends the accepted definition of these words under the civil law governing the minor. The definition does not exclude the person who would be the minor's guardian under the civil law applicable to the minor. This precaution of extending the meaning of the words lawful guardian under the criminal law was taken to preclude persons other than the civil law guardian from raising the technical plea that the legal relation of ward and guardian did not exist between the minor and the person from whose actual custody the minor may happen to be taken away. The person in temporary charge of the minor cannot however take advantage of this definition given in the first explanation to S. 361, I. P. C., as against the guardian at civil law. If I had been satisfied that Ram Tawakkal was the guardian of the minor girl Mt. Rajpatia at civil law, I would not have inquired further into this case. Such a relationship would have saved him and the other appellants from prosecution under S. 363, I. P. C., even in the case of the taking away of the girl being proved. I am of opinion that Ram Tawakkal is not the guardian of Mt. Rajpatia under the Hindu law.

"There was not, even before the passing of Act 8 of 1890 any one other than the father or mother who had an absolute right to the custody of Hindu minor. This was decided in the case of *Kristo Kissor Neoghy v. Kadermoye Dassee* (1), [Trevelyan and Stevens. JJ., *Mt. Bhikuo Koer v. Mt. Chamela Koer* (2).]"

Under the Hindu law Ram Tawakkal has not an absolute right to the custody of Mt. Rajpatia on the sole ground that he happens to be the nearest major male relation of the girl. It was open to the defence to prove that Ram Tawakkal was appointed a guardian either by a Court of law or by the brotherhood or that he had actually assumed such responsibility without any objection being raised by the blood relations or by the brotherhood. If such proof had been forthcoming, it could have been presumed that Mt. Chanderkali had custody of the girl Rajpatia in the capacity of an agent of Ram Tawakkal. There is no such proof on the record. At the trial it was abundantly proved that Mt. Chanderkali acted and was acknowledged as the guardian of the minor girl, and not Ram Tawakkal. Ram Tawakkal is separate from the minor children of his uncle and the guardianship of the children has been undertaken by Mt. Chanderkali the eldest and only major member of the divided family using the word family in its general sense and not in the restricted sense of a collection of males under the Hindu Law. That such is the fact is indicated even by the nature of the defence set up by the appellants. The defence of the appellants Sital Prasad and Ram Sawarath was that the marriage negotiations were carried on between them and Mt. Chanderkali who acted through her agent Ram Tawakkal. It was never suggested that Ram Tawakkal had consented to the marriage and that such consent was sufficient for the performance of the marriage contract. Ram Tawakkal himself, when he surrendered in the Court of the Committing Magistrate, tried to save himself by taking the part of Mt. Chanderkali. On the facts therefore I would set aside the conviction and sentence passed on the three appellants.

Piggott, J.—I concur generally and more particularly with regard to the facts. The appellants were in this difficulty, that Ram Tawakkal was never frank with the Court and that counsel on

his behalf eventually took up a position, at least by way of an alternative defence in this Court, which had never been suggested in the Court below. As regards the two appellants other than Ram Tawakkal, I have no doubt that whatever they did and I do not believe they did precisely what the prosecution witnesses have stated, was done in the bona fide belief that the consent of Mt. Chanderkali had been obtained to the proposed marriage of the minor girl.

Ram Tawakkal's plea that even on the findings of fact recorded by the learned Sessions Judge, he was entitled to an acquittal, labours under this difficulty, that his own defence in the trial Court involved a virtual admission of Mt. Chanderkali's position as the de facto guardian of the minor. I am however satisfied that on the existing state of the record, it is impossible to feel sufficient confidence in the prosecution evidence to find any of the appellants guilty.

By the Court.—We accept the appeals of all three appellants, set aside the conviction and sentence against them and acquit them of the offence. As they have been released on bail, their security bonds will be discharged.

V. B./R.K.

Appeal accepted.

A. I. R. 1919 Allahabad 38 Full Bench

RAFIQUE, STUART AND WALLACH, JJ.

In the matter of *Amrita Lal*.

Civil Misc. No. 276 of 1919, Decided on 6th August 1919, from report of Dist. Judge, Gorakhpur, D/- 17th April 1919.

Legal Practitioners Act (18 of 1879), S. 13 (f) — **Mukhtar addressing grossly insulting letters in connexion with copy applied for can be proceeded against under S. 13 (f).**

A mukhtar practising in a Subdivision addressed certain letters to the Subdivisional Officer in connexion with a copy for which he had applied. The contents of the letters were grossly insulting, and the matter was reported to the High Court, where it was contended that, on the facts, there was nothing which would entitle the Court to take action under Ss. 13 and 14.

Held: that the mukhtar could be proceeded against under S. 13 (f) of the Act. [P 39 C 1]

P. D. Tandon—for Appellant.

Offg. Govt. Advocate—for the Crown.

Judgment.—A notice has been issued to Pandit Amrita Lal, mukhtar, by a Full Bench of this Court on a report of the District Judge of Gorakhpur, dated 17th April 1919, to show cause why the report made against him should not be

(1) [1878] 2 C. L. R. 583.

(2) [1898] 2 C. W. N. 191.

accepted and why proper orders should not be passed against him under S. 14, Legal Practitioners Act. The substance of the complaint is contained in the District Judge's report and the accompanying papers. It is that the mukhtar in question, who practises in the Criminal and Revenue Courts in the Kasia Sub-division of Gorakhpur, had been grossly insulting to a Subdivisional Officer in that Court. The language objected to was contained in three letters, dated 22nd July, 31st July and 5th August 1918.

We have heard the learned counsel who represented the mukhtar in question. He argued upon the wording of Ss. 13 and 14, Act 18 of 1879, but, in the main, confined his plea to a frank admission that the language used in these letters was most improper, coupled with a submission for clemency on the ground that his client had been misled and betrayed into using the language of an improper kind for which he felt genuine regret now that he had time to reconsider his position.

The suggestion that on the facts there is nothing which entitles us to take action under the provisions of Ss. 13 and 14, Act 18 of 1879 cannot possibly be supported. The provisions of S. 13 (f) clearly cover the case, and it is unnecessary to discuss whether it would not also fall under the provisions of S. 13 (b). The facts are very simple.

The mukhtar had applied to the Subdivisional Officer for a copy of a judgment of acquittal. The record, in which the judgment had been passed, did not happen to be in the copying department of the Subdivisional Officer of Kasia and through no fault of his, he was unable to supply a copy of that judgment. It was open to him to forward the application to the headquarters of the Gorakhpur District where the record had been transmitted in the ordinary course, and possibly it was his duty to have forwarded the application to headquarters. It is not quite clear whether the rules of the Kasia Courts had been properly posted up to date, but, in any circumstance, if the officer in charge of the copying department had directed, even without official authorization, that the mukhtar should himself apply at the headquarters for the copy, he would not have done anything serious or anything which a reasonable person could take exception to. What

he did was this. He returned the application to the mukhtar, who refused to receive it. He sent it again to him by post. The mukhtar again refused to receive it. Finally the application was torn up. By this act the mukhtar might have been put to a loss of some 13 annas. On this the mukhtar addressed the officer in charge of the copying department (the officer in question being the Subdivisional Officer, a Deputy Collector and Magistrate of standing and position) a letter, the terms of which were deliberately insulting and offensive. He followed this up with an even worse letter and ended that particular transaction by a third letter, which was the worst of the three. These letters would have been perfectly intolerable if addressed by one private person to another private person, and it is difficult to understand how any man, holding the responsible position which attaches to members of the legal profession could have been so misguided as to write them.

The question remains; How is this man to be dealt with? His learned counsel has put forward everything that can reasonably be said on his client's behalf, and we do not consider that he has said anything too much. He has certainly not said too little. He pleads that the case should be met by a reprimand. Now we have a right to look, not only to the letters with which this man was charged before the Subdivisional Officer, but to certain other papers upon the record to gather how far a reprimand will meet the case. We find from one of the papers, which was a letter admittedly written by this mukhtar some months after the first incident, i. e., a letter, dated 20th March 1919, that when there was a difficulty about renewing his certificate as a revenue agent (a matter with which we have no concern; that has already been decided by the revenue authorities), he addressed the Subdivisional Officer of Kasia not only in the most offensive manner, but actually went so far as to threaten him. The threats undoubtedly were foolish to a degree; they were more like the ravings of a silly child who had lost his temper than the statements of a responsible man. But we are bound to take into consideration that this man, who, we find, when he was proceeded against in the first instance, had said that he had done nothing offensive and that he did not mean to do anything wrong, a few

months later used worse language than before. How can we reasonably expect, if we take the lenient view which his learned counsel has asked us to do, that he will not return to his avocation feeling that he has gained a moral victory, and be even more offensive than before? We naturally do not wish to stand in any man's way, but we are bound to protect not only Magistrates who are doing their duty and should be helped rather than hindered by members of the Bar but also the credit of the legal profession, and it is our duty to take notice of an incident like this in a manner which shall make for the improvement of the person concerned.

The Subdivisional Magistrate who made the inquiry suggested that a year's suspension would be sufficient to bring this mukhtar to his senses. The District Judge appeared to have thought that a larger period was necessary. We are in no way bound by the suggestions made by these officers under S. 14, Legal Practitioners Act. Now the matter has come before us, it is our duty to take the action which we consider necessary and after consultation we have come to the conclusion that the least that we can do is to suspend this mukhtar for two years. He will be suspended from practice for two years accordingly. At the same time he is warned to mend his ways when he returns to practice as his next slip may be his last. The suspension will take place from the date of this order and he will deposit his certificate of practice with the Registrar of the High Court within a week.

V.B./R.K. *Mukhtar suspended.*

A. I. R. 1919 Allahabad 40

PIGGOTT, J.

Kanhaiya Lal and others—Petitioners.
v.

Emperor—Opposite Party.

Criminal Ref. No. 660 of 1919, Decided on 27th October 1919, made by Sess. Judge, Meerut, D/- 20th September 1919.

Stamp Act (2 of 1899), S. 62—Conviction under S. 62 without proof of dishonest intention is not tenable.

In order to secure a conviction under S. 62 there must be a dishonest intention to evade the payment of stamp duty. Where the facts and circumstances of a case show that there was no such intention a conviction under that section is bad in law. [P 41 C 1]

Facts.—The facts appear from the following order of reference by the Sessions Judge:

Lala Hardeo Prasad, his wife Mt. Chandrawati and his minor son Sham Behari Lal, aged 4 years, with five others have been convicted under S. 62, Stamp Act, and sentenced to pay a fine of Rs. 30 each. They have come to this Court in revision under S. 437, Criminal P. C.

The facts giving rise to the present conviction briefly stated are as follows:

The above eight persons arranged to start a small bank, and with that object got the Memorandum of Association prepared by a local legal practitioner, B. Brij Nath, B. A., LL. B. The latter having drafted the Memorandum, dispatched it to the Registrar, Joint Stock Companies, Lucknow, on 8th May last. The ordinary practice is that the Memorandum of Association is first drafted, printed and then submitted to the Registrar for approval as alterations and additions are generally made. In the present case the Memorandum was typed and sent with a covering letter. It may be noted that the executants of this Memorandum obviously in order to make them sure and confident of the transaction, affixed their signatures to the document. The Registrar finding the document duly signed, impounded it as he thought that it ought to have been engrossed on a stamp paper of Rs. 40. The matter was reported to the Collector who made it over to the Stamp Officer for a report. This latter officer reported on 13th June 1919 that the stamp duty of Rs. 40 plus the penalty of Rs. 120 were already paid by the executants, but that they should be prosecuted under S. 62, Stamp Act. The District Magistrate accepted this report and prosecution was started which resulted in the conviction of the applicants.

Babu Brij Nath, vakil, is a respectable person and it is inconceivable how he should have sent the document as an original one. His evidence on the record shows that by sending it to the Registrar as it was he meant to obtain his approval before getting it faired out, printed and finally submitted to His Excellency the Viceroy in Council for a licence as provided by a Special War Enactment. Even the trying Magistrate has found that the applicants never intended to evade payment of duty. In his opinion however intention of evading payment was not at all necessary for the purposes of S. 62. In my opinion this view is wrong. The provision attached to S. 43, Stamp Act

is very clear. It lays down that after the payment of the deficiency and the penalty, if the Collector be of opinion that the stamp duty was evaded intentionally he may order prosecution. In this case it is obvious from the District Magistrate's report and the Collector's order that the latter never ruled that there was any dishonest intention to evade payment. The lower Court has refrained from coming to a finding as to the applicants' mala fides in this matter. It only relied on the sanction given by the Collector. No sooner the applicants were informed of the deficiency than they deposited the Rs. 40 and the penalty Rs. 120, five times. It may be a case of mere oversight on the part of the pleader who sent the papers to the Registrar, and the applicants do not seem to be in any way liable. At any rate, the minor applicant Sham Bihari, who too has been fined Rs. 30, is not in any manner responsible, vide S. 83, I. P. C. Under the circumstances I think that the prosecution and conviction both are unwarranted by law. The exaction of Rs. 120 as penalty was quite sufficient to safeguard the interest of Government revenue. I would therefore recommend to the Hon'ble Court that the conviction and sentence be set aside and the fines, which have been paid, be refunded.

Judgment.—I accept the reference of the learned Sessions Judge. For the reasons stated by him I set aside the convictions and sentences in this case and acquit the accused persons of the offences charged. The fines if paid will be refunded.

V.B./R.K.

Reference accepted.

A. I. R. 1919 Allahabad 41

WALLACH, J.

Nirmal Singh and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 389 of 1919, Decided on 25th July 1919, from order of Sess. Judge, Shahjahanpur, D/- 26th June 1919.

(a) Criminal P. C. (5 of 1898), S. 103—**Respectable person of locality must be called to witness search—Omission would justify opposition to search—No offence under Penal Code, S. 332, would be committed—Penal Code, S. 332.**

An officer of police who is empowered to conduct an investigation, is entitled to carry out a search without a warrant, but in carrying out

such search is bound, under S. 103, to call upon two or more respectable inhabitants of the locality to attend and witness the search, and if he omits to do so, a householder would be justified in closing his door and refusing ingress into the house, and would not be guilty of an offence under S. 332, Penal Code. [P 42 C 1, 2]

(b) Penal Code (45 of 1860), S. 332—**Illegal search may be opposed but police officer cannot be compelled to do illegal act.**

While it may be necessary to oppose a police officer from forcing his way into a house in order to honestly prevent an illegal search, there would be no justification for compelling him to do something illegal. [P 42 C 2]

J. M. Banerji—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—A Magistrate of the First Class convicted eleven persons under Ss. 147 and 332, I. P. C., for rioting and causing hurt to a public servant in discharging his duties, and sentenced them to varying terms of imprisonment and to fines. On appeal the learned Sessions Judge of Shahjahanpur allowed the appeal of one Sukdeo Singh but dismissed the appeal of the other ten appellants, upholding the sentences passed on them. These ten persons have filed revision in this Court against their convictions and sentences and were released on bail by the learned Judge who admitted their applications. The facts of the case are somewhat singular. It appears that a burglary was committed on the night of the 30th September 1918 in the house of one Bhujai in the village of Kandar, in which besides other property, a brass thal and a lota were lost. A report was made in the ordinary course and Sub-Inspector Godhan Lal, second officer of the police station, Jalalabad, within whose circle the offence was committed, took up the investigation. He suspected one Harsahai Bhangi, and on 5th October he first searched his house, and finding nothing he proceeded, on information received that the stolen property was in the possession of one Nirmal Singh of Kateli, a village some two furlongs away from Kandar, to Kateli and at once wanted to search his house. Chunna and Partil, chowkidars, had in the meantime, come up and were with him at the time. According to the facts as found by the Courts below, he informed Nirmal Singh that he suspected that the stolen property was in his house and wanted to search it. Nirmal Singh and the other applicants resisted his doing so, and whilst thus resisting, they are alleged to have caused simple injury both to him as well as to

the chowkidars. They are further alleged to have snatched his pagri and revolver from him, and are alleged further to have compelled him under threats to draw up a search list saying that a search had been made and that nothing had been found. These facts are contested by the petitioners, but I am not prepared to go behind the findings of fact in revision. Several points of law have been raised by the petitioners. It is claimed that the search was wholly illegal on two grounds:

(1) It is argued that the Sub-Inspector was not empowered to proceed on the search without a warrant. I am not prepared to accept this contention. The Sub-Inspector was undoubtedly empowered to investigate. Being empowered to investigate the charge he had, in my opinion the right to search, which is incidental to his right to investigate.

(2) It is further argued in support of the petitioners' application that the officer conducting the search was bound under S. 103, Criminal P. C., to call upon two or more respectable inhabitants of the locality to attend and witness the search. That section further provides that the search shall be made in the presence of search witnesses. It is admitted on behalf of the Crown that the provisions of this section were totally ignored by the Sub-Inspector, but it was argued in support of the conviction that the provisions of that section were purely formal and that noncompliance with the same would not invalidate the search and that therefore the officer conducting the search, in spite of his ignoring the provisions of that section, was acting in the discharge of his duties, and that the interference with him would constitute an offence under S. 322, I. P. C. In the absence of any authority in support of the learned Government Advocate's contention I am not prepared to uphold it. Police officers must be protected when acting in the exercise of their duties. The public have also rights, and it is very important that those rights of the householder should be safeguarded. S. 103, Criminal P. C., was introduced into the Act in order to safeguard the rights of a householder and also to ensure that the search conducted by the police officials should be an honest search and a genuine one. I am prepared to go so far as to hold that when the provisions of that section are ignored, a house-

holder is justified in closing his door and refusing ingress into his house. Holding this view I am of opinion that no offence under S. 332, I. P. C., has been made out. On the other hand it is quite clear on the facts as found, that the applicants were absolutely unjustified in the further action taken by them beyond merely preventing the police officer from entering the house. This further action consisted in compelling the police officer to draw up a document setting out that a search had been made and nothing was found. The petitioners, through their counsel here, deny that such action was taken by them and the learned counsel asks me to look into the evidence in order to satisfy myself on that point, but I am not going to look into the evidence in a revision. It may have been necessary, for the purpose of honestly preventing the Sub-Inspector from forcing his way into the house and conducting the illegal search, to snatch away his revolver, but there can be absolutely no justification for the further action of compelling him to write out the false statement that the search had actually taken place. Whilst being therefore of opinion that the petitioners should be acquitted of the charge under Ss. 147 and 332, I. P. C., I am of opinion that they are guilty under S. 503 read with S. 149, I. P. C.

The applicants have been sentenced to heavy terms of imprisonment and also to heavy fines. I am informed that each of them has undergone ten days' rigorous imprisonment. They have served sufficient terms of imprisonment and I reduce the periods of their imprisonment to the periods already served. It is further submitted, and not contested, that the ten petitioners are members of one and the same family. The combined fines to which they have been sentenced amount to an aggregate sum of Rs. 1,900. I sentence each of the petitioners to a fine of Rs. 50 in addition to the imprisonment under the section under which I have convicted them. In case of nonpayment of fine, each accused, who does not pay such fine, will serve a term of three months' rigorous imprisonment.

V.B./R.K.

Sentences reduced.

A. I. R. 1919 Allahabad 43

LINDSAY, J.

Bazmir Khan and others—Plaintiffs—Appellants.

v.

Rustam Khan and others—Defendants—Respondents.

Second Appeal No. 1613 of 1917, Decided on 13th November 1919, against decree of Dist. Judge, Budaun, D/- 18th May 1917.

Possessory Title—It is good against world except true owner—Heirs can continue in possession.

A person in possession of property however imperfect his title may be, has good title as against the whole world, except the true owner, and such title is capable of descending by inheritance to his heirs. Until the true owner comes forward to assert a claim to the property, such heirs are entitled to continue in possession. [P 44 C 1]

Ibini Ahmad—for Appellants.

Iqbal Ahmad and Mangal Prasad Bhargava—for Respondents.

Judgment.—This appeal, in my opinion, must prevail. The facts may be briefly stated as follows: The dispute relates to a small parcel of zamindari property which admittedly belonged at one time to a lady called Muhammadi Begum. She died in the year 1911.

It is now admitted that before her death, that is to say, in the year 1907, Muhammadi Begam made gift of her property to two persons, Inayat Khan and Rustam Khan. Rustam Khan is the principal defendant-respondent in this appeal.

According to the finding of the lower appellate Court the history of Inayat Khan and Rustam Khan is this: They were foundlings who were discovered in the bazar at Peshawar by the husband of this lady Muhammadi Begam. They were brought to Muhammadi Begam's house and were reared as her children, she having no children of her own. It is found however that there was no blood relationship between Inayat Khan and Rustam Khan.

Inayat Khan died in 1909 and at the time of his death he had become the owner by gift of the property now in dispute. Claims for mutation in respect of this property were put forward by Muhammadi Begam on the one hand and by Rustam Khan on the other hand. The Revenue Court decided in favour of Muhammadi Begam, and the property continued to be recorded in her name

down till the time of her death in the year 1914. After the death of the lady there was another dispute regarding mutation. The present plaintiffs-appellants Bazmir Khan and others claimed mutation on the ground that they were legal heirs to the estate of Muhammadi Begam. Rustam Khan, the principal respondent, also claimed as an heir on the ground that he was the brother of Inayat Khan and was the true owner. The result of this dispute was that the Revenue Court awarded mutation in favour of Rustam Khan, and so we have the present suit in which the plaintiffs claiming as heirs of Muhammadi Begam came into Court and asked for recovery of possession. The Courts below have dismissed the plaintiffs' claim.

I have already referred to the fact that the story put forward by Rustam Khan that he was the brother of Inayat Khan and consequently his heir has been exploded. It is clear therefore that Rustam Khan has no right to this property on the ground that he is an heir of Inayat. On the other hand, it is admitted that the plaintiffs are the rightful heirs of Muhammadi Begam. The learned Judge of the Court below however has taken a peculiar view of the case. He says in his judgment that after the death of Inayat Khan who had acquired this property by gift, Muhammadi Begam had no right to possession of the property and consequently as she had no right and as Rustam Khan has no right to the property, it has escheated to Government; and so he says that the plaintiffs, although he finds them to be the rightful heirs of Muhammadi Begam, have no claim to be put in possession on the ground that Muhammadi Begam had no title to the property herself. It is clear that this opinion of the lower appellate Court is wrong. While it may be the case that Muhammadi Begam had no title as heir to this property after the death of Inayat Khan, it is nevertheless clear that she was at least in possession without title and her possessory title was capable of being disposed of either by transfer or by inheritance. The law on this subject has been well settled and I need not refer to the long series of authorities. The case specially relied upon by the learned counsel for the appellants is reported as *Gobind Prasad v. Mohan Lal* (1). That

case followed the well known case of *Asher v. Whitlock* (2). Another case has been referred to in this connexion, an unreported case, Second Appeal No. 1399 of 1913, decided by Sunder Lal, J., on 3rd July 1914. There can be no doubt that at the time of her death Muhammadi Begam had a title which though perhaps imperfect was nevertheless capable of descending by inheritance to her heirs, who are the plaintiffs, and until the true owner of this property comes forward to assert a claim, the heirs of Muhammadi Begam are entitled to possession. I say nothing regarding the rights of Government in this matter. If the property has escheated to Government, it can come forward and assert its claim if so advised. All that is necessary to say here is that Rustam Khan, who has no title of any kind to the property, cannot be maintained in possession to the exclusion of the plaintiffs who are the heirs of Muhammadi Begam.

The learned counsel for the respondents in arguing his case referred to the provisions of S. 41, T. P. Act. I take it that his intention was to suggest that the defendants in this case other than Rustam Khan were entitled to be maintained in possession notwithstanding the status of the plaintiffs as heirs of Muhammadi Begam. Their case was that they were bona fide purchasers for value from Rustam Khan whose name was entered in the khewat. That plea is no answer to the plaintiffs' case. If Rustam Khan had no title whatever to this property, he could not by sale or otherwise convey any title to this property to the other defendants. As to S. 41 it cannot help the case of these defendants purchasers, unless indeed they could show that there was something in the conduct of the present plaintiffs entitling them to say that their purchase could not be avoided by the plaintiffs. S. 41 covers the case of the transfer of property by an ostensible owner, that is to say, by a person who has been in ostensible possession with the consent, express or implied, of the true owner. No such case can be set up here however for in view of the facts which have been set out before, there is nothing to suggest that the present plaintiffs ever stood aside and consented, either expressly or by implication, to

Rustam Khan's holding himself out as the owner of this property. On the contrary it was shown that they fought with Rustam Khan in the mutation Court and lost their case there. No question of consent, express or implied, arises and so S. 41 has no application. I have dealt now with all the points which have been raised in the course of argument and the result is that I find in favour of the plaintiffs and the suit will accordingly be decreed with costs in all the three Courts, including in this Court fees on the higher scale. The appeal is allowed and the decree of the Court below is set aside accordingly.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 44**

WALLACH, J.

Nandu and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 406 of 1919, Decided on 8th August 1919, against order of 1st Class Magistrate, Kara, D/- 22nd May 1919.

(a) **Criminal P. C. (5 of 1898), S. 188—Offence committed in State—Accused arrested in British India—Certificate under S. 188 is essential.**

A subject of a Native State arrested in British India cannot be tried in a British Indian Court for an offence committed in that State without the certificate of the Political Agent of the State or the sanction of the Local Government required by S. 188. [P 45 C 1]

(b) **Criminal P. C. (1898), S. 188—Agreement allowing Native State subjects to be tried in British India cannot replace certificate or sanction necessary under S. 188.**

An agreement between a Native State and the authorities of a British Indian district, conceding to the British Indian Courts the right to try subjects of the State arrested in British India, cannot take the place of the certificate or sanction contemplated by S. 188. [P 45 C 1]

*B. N. Vyas—for Applicants.**Asst. Govt. Advocate—for the Crown.*

Judgment.—The applicants have been sentenced to fines of Rs. 20 and in default to three weeks' rigorous imprisonment for offences under S. 13, Act 3 of 1867, alleged to have been committed in Kampta, which is a Native State. Objection was taken at the hearing of the case that gambling was not shown to be an offence in the Native State in question, and secondly, that the requirements of the proviso to S. 188, Criminal P. C., had not been satisfied. That proviso sets out that:

(2) [1865] 1 Q. B. 1=35 L. J. Q. B. 17=13
L. T. 254=14 W. R. 26.

"When a native Indian subject of His Majesty commits an offence in the territories of any Native Prince or Chief in India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found: Provided that no charge as to any such offence shall be inquired into in British India, unless the Political Agent, if there is one in the territory in which the offence is alleged to have been committed, certifies that in his opinion the charge ought to be inquired into in British India and where there is no Political Agent, the sanction of the Local Government shall be required."

The learned Magistrate has dealt in a light and airy fashion with these legal objections. Even if the applicants could be convicted of an offence of gambling in the Native State in question, they cannot be proceeded against in the absence of the certificate or the sanction set out in the proviso to S. 188, Criminal P. C. The Magistrate who tried the case says:

"A few months ago under the instructions of the Political Agent a committee was constituted of some members of the Native State concerned and some members of the executive authorities in British India, and it was mutually agreed for convenience that British India police might arrest persons found gambling in the Native State and try them in British India if they are British Indian subjects and send them to the Native State if they are subjects thereof; and vice versa the Native State police could arrest persons found gambling in British India."

An agreement like this cannot take the place of a certificate or sanction which is contemplated by the section aforesaid. Where there is a bar to the prosecution of a person, unless certain formalities are carried out, those formalities have to be strictly carried out. I hold therefore that there was no jurisdiction to try the applicants at Banda, and I therefore set aside the conviction and sentence and direct the fines, if paid, be refunded.

V.B./R.K.

Conviction set aside.

A. I. R. 1919 Allahabad 45

LINDSAY, J.

Ram Lagan Pande and another—Defendants—Applicants.

v.

Mahomed Ishaq Khan and another—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 172 of 1918, Decided on 21st November 1919, against decision of Munsif, Ghazipur, D/- 26th August 1918.

Pre-emption—Decree — Amount of costs awarded can be deducted and balance of pre-emption money deposited.

Where a pre-emptor is directed to pay into Court a specific sum of money and is awarded

costs, he is entitled to deduct the amount of the costs so awarded from the sum he is directed to pay into Court. [P 46 C 1]

K. K. Varma—for Applicants.

S. N. Mukerjee—for Opposite Parties.

Judgment.—It appears that the plaintiffs opposite party in this case brought a suit for pre-emption and on 30th May 1918 got a decree. According to the decree the plaintiffs were liable to pay a sum of Rs. 100, and the decree provided that in default of payment within one month from the date of the decree the suit should stand dismissed. It is also apparent that the decree awarded a sum of Rs. 9 odd to the plaintiffs by way of costs payable by the defendants. What followed was this: Within the prescribed period of one month the plaintiffs deposited a sum of Rs. 99. Why this sum was deposited is not altogether clear, but for the purpose of deciding this case it is not necessary to examine this question. Later on it was noticed that the full amount of Rs. 100 mentioned in the decree as the purchase money had not been deposited. On 26th August 1918 the plaintiffs made an application to the Court praying for extension of the time in order that the deficit of one rupee might be paid into Court. The lower Court thereupon passed an ex parte order extending the time. The Court professed to act under S. 151 of the Code.

This application has been filed here for the purpose of obtaining a revision of the lower Court's order. A preliminary objection was raised to the hearing of this application on the ground that the order of the first Court was appealable but in view of the Full Bench decision reported as *Suranjan Singh v. Ram Bahal Lal* (1) this argument cannot prevail. It was there held that an order such as has been passed by the Court below in the present case was not appealable and could only be made the subject of revision. There is no bar therefore to the entertaining of this application. The other question is whether the order of the Court below can be disturbed in revision. It has indeed been held in various cases in this Court that in cases where a decree for pre-emption is passed in the terms laid down in O. 20, R. 14, Civil P. C., it is not open to the Courts to extend the time fixed for payment. That principle was laid down in *Suranjan Singh v. Ram Bhal Lal* (2)

(1) [1913] 35 All. 582=21 I. C. 585.

(2) [1912] 17 I. C. 912.

and was affirmed by the Full Bench ruling to which I have already referred. It has however been argued here that although the plaintiffs pre-emptors deposited only a sum of Rs. 99 within the period fixed, there was nevertheless a full compliance with the direction contained in the decree and it is sought to make good this argument by referring to the fact that under the decree the plaintiffs were entitled as against the defendants to a sum of Rs. 9 odd by way of costs. The learned counsel for the opposite party has referred me to several cases in support of this contention. One of these is mentioned as *Bechai Singh v. Shami Nath* (3). It was a case decided by Banerji, J., on 25th April 1911. I have had the record of the case before me. It is *Second Appeal No. 91 of 1911, Bechai Singh v. Shami Nath* (3). It was there held by Banerji, J., in accordance with other rulings of this Court, that in a case like the present where the pre-emptor plaintiff was entitled to costs, he was entitled to deduct any portion of the purchase money unpaid from the amount of costs owing to him.

It follows therefore that this principle has been accepted and it must be held in the present case that the plaintiffs complied substantially with the terms contained in the decree. I observe that this ruling of Banerji, J., was affirmed in Letters Patent appeal on 27th July 1911. I have also been referred to another ruling of a Bench of this Court to be found reported as *Ali Husain v. Amin Ullah* (4). There it was laid down that where a pre-emptor deposited in Court the sum he was required to pay by the decree to the vendee less the costs awarded to him he had completely complied with the order of the Court. In this ruling the decision of Banerji, J., to which I have referred above, was quoted. It seems to me therefore that on the authority of these cases it is not possible for me to hold in favour of the applicants here that there was a failure to comply with the terms of the decree, and that being so it is not competent to me to interfere with the order of the Court below although it may be that the Munsif was, as a matter of law, entitled to extend the time and pass the order which he actually passed. If it appears that there was substantial compliance with the terms of the

decree then the order ought to be allowed to stand although it may be conceded to be wrong in form. The result is that I dismiss this application with costs to the opposite party.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 46

WALSH, J.

Kadhory and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 332 of 1919, Decided on 8th July 1919, from order of Munsif, Mainpuri, D/- 21st May 1919.

(a) **Government of India Act, S. 107—Though Munsif's Court is not inferior Court within S. 435, Criminal P. C., High Court can interfere in revision in proceedings for contempt of Court—Criminal P. C., S. 435.**

Although the Court of a Munsif is not an inferior criminal Court within the meaning of S. 435, Criminal P. C., the High Court has ample power under S. 107, Government of India Act, to entertain an application for revision of an order made by a Munsif in a proceeding in which a suitor is called upon to show cause why he should not be committed for contempt of Court.

[P 48 C 1]

(b) **Contempt of Court—Statement in application that ex parte order was against rules and against law is no contempt of Court.**

An application was made to a Munsif by a vakil on behalf of certain minor plaintiffs to set aside an order dismissing their suit in default, the said order being described in the application as one "against law." The Munsif stigmatised this as contempt of Court and issued notice to the minors to show cause why they should not be committed for contempt of Court in respect of the application. On an application made to the High Court in revision:

Held: that there was nothing in the application for restoration to which exception could possibly be taken.

[P 47 C 1, 2]

Uma Shankar Bajpai—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—In this case the Munsif of Etawah was holding his ordinary Court on a certain Friday, 2nd May 1919. It is alleged, and not denied, that he announced that miscellaneous cases only would be taken that day; and the following day, which was a Saturday, certain minors represented by their guardians were plaintiffs in a suit pending in the Court. They were represented by a vakil, and after waiting until 4-30 p. m. they left the Court. The ordinary sitting of the Court is 10-30 a. m. to 4 p. m. and speaking from my limited experience of this country, I should say that anybody who began a civil case after 4-30 p. m. in the month of May would be ex-

(3) [1911] 10 I. C. 457.

(4) [1912] 34 All. 596=15 I. C. 337.

tremely foolish, and that the parties engaged would have a right to object. Next day the plaintiffs' vakil discovered that the case had been dismissed for default. The Munsif has not condescended to explain what this means, why the case was called on and what the default was for which it was dismissed. It is obvious on the facts before me, unless there is a great deal more behind it and that that is an improper order which ought to be set aside. And if it came before me it would certainly be set aside in revision. It may be that there is some reason for it, but whether there be, or whether there be not, the vakil, finding what had happened, did what it was his obvious duty to do, indeed the minimum which he could do on behalf of his clients; he applied for restoration. All I know is that on that first application no order was made, and a second application was put in asking for a day to be fixed for the new hearing. Here again I am left entirely in the dark so far as the Munsif's view of the case is concerned, because I do not know whether he refused to restore it and if so why, or whether he has made any order, or was willing to make any order, restoring the case to his pending file. But upon these applications he proceeded to pass an order which really is one of the most remarkable orders I have ever read. He treats the applications made to him to restore the suit to his list as having been utilized as a vehicle for criticising and threatening him and, having rightly remarked that if he, the Judge, had neglected his duty he must be dealt with elsewhere, he proceeded to stigmatize the remarks and so-called threats as "contempt of Court" and give notice to the minors to show cause why they should not be committed for contempt of Court in respect of an application which had clearly been made on their behalf by their vakil, and asked the vakil for an explanation.

I am inclined to think that whatever the contents of the application, the Munsif could not have made the order he did; but except that an expression is used in the application which is somewhat cumbersome and forcible for describing the order dismissing the suit which was objected to but which is not unusual or unfamiliar in style having regard to the language frequently used in pleadings in the mofussil, there is nothing in the application to

which exception can possibly be taken. The expression to which I have referred is to the following effect, that the order which had been made the day before and which was objected to, was "against rules and against law." I really do not know what the Munsif meant by what he said. It is one of the commonest grounds adopted in a memorandum of appeal objecting to a decree or an order to say that it is contrary to rule or that the decision is contrary to law, and the codes in this country in more than one place speak of matters being contrary to some rule having the force of law, and how an application based upon the ground that the previous order of the Court had been contrary to rule, or contrary to law, can be regarded as a threat or as improper, I am at a loss to understand. People sitting to administer justice and to hear the complaints of contending parties and alleged grievances of all sorts and kinds which come into Courts of law, and liable to have their own decisions challenged, and sometimes severely criticized, in the Courts of appeal, must not be too thin-skinned. If the Munsif really thought that the vakil had said anything in the application beyond what the occasion demanded, the proper course was for him to deal with the application on the merits, and to communicate privately with the vakil as to any personal matter which he thought arose. As a matter of fact I cannot see that there was anything personal in the application from first to last, and it is extremely unfortunate that the Munsif should from time to time somewhat impetuously jump to the conclusion that some offence is meant where none is intended. The order is a perfectly childish one and must be quashed.

Under what jurisdiction precisely this Court has power to quash it is a matter which may be open to argument. I do not think it really matters because it is an order which, if brought before this Court, in any reasonable form, is bound to be set aside. It has been admitted as a criminal revision by a very experienced Judge of this Court, but there is a difficulty about that inasmuch as the Munsif is not an inferior criminal Court within the meaning of S. 435. It might be held to be a case decided by the Munsif from which there was no appeal within the meaning of S. 115, Civil P. C., being a decision of his upon the application made to him on

3rd May so as to entitle this Court to interfere in civil revision. But the matter having been brought before the Court, it matters not how, I have not the slightest doubt that this Court has power under S. 107, Government of India Act, if under no other section, to make the order which I make.

V.B./R.K.

Order quashed.

A. I. R. 1919 Allahabad 48

LINDSAY AND RYVES, JJ.

Ahmad Noor Khan —Plaintiff—Appellant.

v.

Abdur Rahman Khan and others—Defendants—Respondents.

First Appeal No. 178 of 1918, Decided on 25th November 1919, from order of Sub-Judge, Pilibhit, D/- 8th June 1918.

Civil P. C. (5 of 1908), Sch. 2, para. 17—On arbitrator's refusal agreement to refer to same arbitrator cannot be enforced.

Where an arbitrator definitely refuses to act, no matter for what reason, the Court has no jurisdiction to entertain an application to enforce the agreement to refer the dispute to the arbitration of such arbitrator. [P 49 C 1]

S. M. Sulaiman—for Appellant.

Tej Bahadur Sapru and R. K. Malavya, Iqbal Ahmad and N. Upadhya—for Respondents.

Judgment.—This appeal has arisen out of proceedings which were taken in the Court below under the provisions of para. 17, Cl. 1, Sch. 2, Civil P. C.

It seems that there was some dispute between the members of two families descended from two brothers, Bala Khan and Ahmad Noor Khan. A suit relating to this dispute was filed in Court, and while the suit was proceeding the parties executed an agreement on 20th March 1915 agreeing to refer their dispute to the arbitration of Khan Bahadur Abdur Rahman Khan. The result of the execution of this agreement was that the suit was withdrawn and the arbitrator took upon himself the duty of investigating into and deciding the dispute between the parties. On various dates in the year 1916 the arbitrator examined witnesses and finally the case came up before him again on 18th March 1917. On that date he was informed that one of the parties to the dispute, namely, Akhtar-ud-Din Khan, had died, and it would appear that some application was made to him asking him to send notice to the legal representatives of Akhtar-ud-Din before any fur-

ther proceedings were taken. The arbitrator sent out some notices, and on 25th March 1917 he put in writing a definite refusal to go on with the arbitration. He said that as one of the parties to the reference had died, he had no legal authority to make the legal representatives of the deceased party parties to the proceedings. After this he returned the parties their documents and nothing more was done. On 2nd November 1917 the present plaintiff appellant filed this application under para. 17, Sch. 2, Civil P. C., asking that the agreement to refer to arbitration might be filed in Court. In other words, the intention of the appellant is that the Court should order the arbitration proceedings to go on as before, and should direct the arbitrator to carry out the settlement of this dispute.

The Court below has dismissed the application. It is not necessary for us to examine the various reasons which the Subordinate Judge has given in support of his order. It is sufficient to refer to his finding on issue 3, namely, that by reason of the refusal of the arbitrator to act, the deed of reference has become unenforceable.

If the appellant here cannot succeed in showing us that the finding of fact that the arbitrator refused to act is wrong, then the order of the Court below must be maintained. The learned counsel for the appellant has not found it possible to argue that this finding of fact is erroneous, nor indeed would it have been easy for him to do so in view of the clear statement made by the arbitrator himself when examined as a witness in the case. In the course of his deposition he stated clearly that he had refused to go on with the arbitration, his reason being that one party to the reference having died, he considered that he had no authority to continue the proceedings. Whether or not the arbitrator was right in supposing that in these circumstances he had no authority to continue to act, is a matter with which we are not concerned. The fact remains that he definitely refused to act and that at the time this application was filed under para. 17 his refusal was still in force. It is quite true that in the course of his examination in Court the arbitrator expressed his willingness to resume his functions as arbitrator provided the Court would give him an order to that effect. In the first place, this offer,

if it can be treated as an offer, was only qualified. In the next place, we do not think the Court had any jurisdiction to give the arbitrator any direction to carry on. The result therefore is that we have before us an application to enforce an agreement to refer a dispute to the arbitration of a gentleman who had already declined to act, and in these circumstances we hold that it would be quite impossible for the plaintiff to have an order such as he sought in the Court below.

Other points are set out in the memorandum of appeal here, but it has been agreed before us that the decision of the point which we have already determined is sufficient to dispose of the appeal. The result therefore is that the appeal fails and is dismissed with costs. The costs in this Court will include fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 49 (1)

BANERJI AND WALLACH, JJ.

Jang Bahadur Rai and another—Defendants—Appellants.

v.

Raj Kumar Rai and another—Plaintiffs and Defendants—Respondents.

Second Appeal No. 849 of 1917, Decided on 15th July 1919, from decision of Dist. Judge, Ghazipur, D/- 11th June 1917.

Civil P. C. (5 of 1908), S. 107—Appellate Court can examine either party.

An appellate Court is competent to examine any of the parties if, for the sake of doing justice and for the purpose of ascertaining facts, it considers it necessary to do so. [P 49 C 2]

U. S. Bajpai—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—The suit out of which this appeal has arisen was practically a suit for declaration that the adoption of the defendant Jang Bahadur Rai, alleged to have been made by Deo Saran Rai, did not in fact, take place and that Jang Bahadur is not the adopted son of Deo Saran Rai. The plaintiff is the brother of Deo Saran Rai, who is now dead. Mt. Parmati defendant is Deo Saran's widow. She executed a document in which she declared that her husband had adopted Jang Bahadur Rai, son of another brother of Deo Saran Rai and that Jang Bahadur was Deo Saran's adopted son. The plaintiff's allegation was that he and Deo Saran were joint and that in fact Deo

Saran never adopted any boy. The Court of first instance held in favour of the adoption and dismissed the claim. The lower appellate Court was of opinion that no adoption took place and that the allegation of an adoption is untrue. It however held that the two brothers were separate and not joint as alleged by the plaintiff. The defendant Jang Bahadur has preferred this appeal, and the main contention is that the Court below was not justified in examining the defendant Mt. Parmati, who in the appellate Court gave evidence contrary to her allegations in the Court of first instance. In our opinion the appellate Court was competent to examine any of the parties, if it considered it necessary for the ends of justice to do so. Mt. Parmati was a party to the suit and the learned Judge had the power, in our opinion, to examine her for the purpose of ascertaining the facts. He however did not decide the case solely or mainly on the evidence of Mt. Parmati, but on other evidence to which he refers in his judgment. His finding upon the question of adoption is a finding of fact and must be accepted by us in second appeal. In this view the appeal fails. We dismiss it with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 49 (2)

TUDBALL AND RYVES, JJ.

Mt. Sudhia—Defendant—Appellant.

v.

Makka—Plaintiff—Respondent.

First Appeal No. 110 of 1919, Decided on 28th November 1919, from order of Offg. Dist. Judge, Cawnpore, D/- 4th June 1919.

(a) Guardians and Wards Act (8 of 1890), Ss. 7 and 17—If mother is competent and of good character no guardian of minor boy need be appointed.

In the absence of any allegation against the character of the mother of a boy aged 9 years and of anything to show that she is not capable of looking after the child, the appointment of a guardian is unnecessary and the boy should not be removed from her care. [P 50 C 1]

(b) Guardians and Wards Act (8 of 1890), Ss. 7 and 17—If object of appointment is assertion of one's right and not welfare of minor no appointment should be made.

Where the object of a person who applies to be appointed the guardian of a minor is not so much the welfare of the minor as the vindication of his own rights to be appointed a guardian, his application should be disallowed. [P 50 C 1]

K. N. Kaiju—for Appellant.

S. M. Sulaiman—for Respondent.

Judgment.—This is an appeal from an order passed by the Court below appointing the grandfather of the minor to be guardian in spite of the objection made by the appellant who is the minor's mother. The minor is now said to be 9 or 10 years of age. The parties are Mahomedans. The property of the family consists of two buffaloes in which the mother and the other children also have shares. In the course of the proceedings the respondent, the applicant for the guardianship, stated that he did not wish to handle the property and that it might be left with the mother. The sole ground upon which he applied to be made guardian of this minor was that the mother's brother was denying his right to be guardian. The object, therefore of his application is not the welfare of the minor but the vindication of his own rights to be a guardian. The minor's father died six years ago. The minor arrived at the age of seven years some three years ago. It is an admitted fact that the mother has always taken care of her children. The respondent Makka, the grandfather, has not taken any steps to benefit the minor all these years. Admittedly there are two religious factions in this caste; the mother belongs to one, while the respondent belongs to the other. It appears to us that this is probably the cause of the application. We cannot see that it is for the benefit and welfare of the minor that a child of his years should be taken from his mother against whose character no allegations whatsoever have been made. The circumstances are such that in our opinion there is no necessity whatsoever to appoint any guardian. The mother is quite capable of looking after her own children. We therefore think that the order of the Court below is not based on good grounds. We allow the appeal and set aside the order of the Court below. There is no necessity whatsoever in the present case for the appointment of any guardian. The appellant will have her costs from the respondent in both Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 50**

STUART, J.

Shudarshan Maharaj Nand Ram —
Plaintiffs—Applicants.

v.

E. I. Ry. Company — Defendant —
Opposite Party.

Civil Revn. No. 11 of 1919, Decided on 31st July 1919, from order of Sm. C. C. Judge, Cawnpore, D/- 19th December 1919.

(a) **Railways Act (9 of 1890), S. 75—Scope of—What must be proved to avoid liability under S. 75 stated — Meaning of S. 75 stated.**

In order to avoid liability under S. 75, a Railway Company must establish: first, that the articles composing the consignment were articles mentioned in Sch. 2 to the Act; and secondly, that the total value of the consignment exceeded Rs. 100. There is no justification for reading the section as though it meant "when any articles mentioned in Sch. 2 are articles of intrinsic value and contained in a parcel or package delivered to a railway administration for carriage by railway." [P 50 C 2]

(b) **Interpretation of Statutes—Statements and objects—Discussion and views of legislative body should not be taken into account —Plain meaning of words must be looked to.**

In interpreting the meaning of a word in a legislative enactment, it is the duty of the Court to refrain from examining the discussion and the views of the legislative authority which enacted the statute. It has to look at the meaning of the word only. [P 50 C 1, 2]

K. N. Katju--for Applicants.

C. U. Shastri--for Opposite Party.

Judgment.—This application raises a point of some little interest. The plaintiff sued the East Indian Railway Company for damage done to a consignment containing machine-made lace. The consignment was of over the value of Rs. 100, but the value and the contents had not been declared and no extra freight had been paid by way of compensation for increased risks.

The Railway Company pleaded that under the provisions of S. 75, Act 9 of 1890, it was not liable.

The contention on the other side is that the word "lace" in Sch. 2, Act 9 of 1890 means hand made lace and not machine-made lace. In support of this contention their learned counsel has referred to 28 and 29 Victoria, Ch. 94, S. 1. This was an Act to amend the Carriers Act in England and this section laid down that where the word "lace" was used in the Carriers Act, it was to be construed as not including machine made lace; but the fact that this Amend-

ing Act was passed is no authority for an interpretation that the word "lace" standing by itself does not include machine-made lace. As I interpret the Amending Act, it simply excludes from the provisions of the Carriers Act machine-made lace. Had the Act not been passed, machine-made lace would have been included in the provision. The passing of the Amending Act excludes machine-made lace from the operation of the Carriers Act in England, but in the Indian Railways Act the word "lace" must necessarily include both hand-made lace and machine-made lace. If the Act contained the word "boots," it could hardly be contested seriously that the word "boots" means only hand-made boots and excludes machine-made boots. Applying the ordinary meaning of the word "lace" both in colloquial and in business and technical senses, machine-made lace is as much lace as hand-made lace.

The learned counsel for the applicants has further pressed that his clients should succeed unless it be found that the lace in question is of exceptional value. In support of his argument he relied on the decision in *Sarat Chandra Bose v. Secy. of State* (1), in which a Bench of the Calcutta High Court laid down that the word "shawls" in Sch. 2, Act 9 of 1890, could only refer to Indian shawls of special value and could not be taken to apply to shawls of inferior value. If the principle in that decision be accepted, it would be possible by analogy to infer that the word "lace" in Sch. 2 meant only lace of high value. But I regret that I am unable to accept either the reasoning or the conclusion of the learned Judges who formed that Bench. They had to interpret the meaning of the word "shawl." They found what the interpretation of the word "shawl" was in the English language, but they proceeded to consider what was the probable meaning which the legislature intended to apply to such a term when the schedule was first drawn up and how far its meaning was to be determined by reference to the other items in the schedule. With due respect to the learned Judges who decided that appeal, I would point out that their first principle of interpretation is not in accord with the principles of interpretation known to the law. It is the duty of a

(1) [1912] 39 Cal. 1029=14 I. C. 726.

Court interpreting the meaning of a word in a legislative enactment to refrain usually from examining the discussions and the views of the legislative authority which enacted the statute. It has to look at the meaning of the word only. In the next place, I cannot find the slightest authority for supposing that those who enacted the statute intended the word "shawls" to mean only expensive shawls. It is quite clear from the schedule that many articles were included which were necessarily of small intrinsic value, for example, watches, clocks and time-pieces of any description. This must include the cheapest watches, locks and time-pieces. Government stamps will equally include a Government stamp valued at half-anna and a Government stamp valued at Rs. 1,000. In order to avoid liability under the provisions of S. 75, Act 9 of 1890, a Railway Company has to establish two conditions. The first is that the articles composing the consignment are articles mentioned in Sch. 2. The second is that the total value of the consignment exceeds Rs. 100. There is nothing from which an inference can be drawn that each article in the consignment must be of value. The railway would be equally protected in the case of a consignment of Rs. 150 worth of half-anna stamps as it would be in the case of a consignment of one stamp worth Rs. 150. There is no justification for reading S. 75 as though it meant "when any articles mentioned in Sch. 2 are articles of intrinsic value and contained in any parcel or package delivered to a railway administration for carriage by railway."

That is how the Calcutta High Court have read the section. I regret that I am unable to adopt the same interpretation. I accept the view of the learned Small Cause Court Judge and dismiss this application with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 51

LINDSAY, J.

Parshotam Das and another—Plaintiffs—Appellants.

v.

B. Biththal Das and another—Defendants—Respondents.

Second Appeal No. 1615 of 1917, Decided on 22nd November 1919, against decision of Dist. Judge, Benares.

Interest Act (32 of 1839), S. 1—Interest cannot be claimed without agreement or demand.

In the absence of any agreement to pay interest upon a particular transaction or of any notice of the creditor's intention to claim interest in case the debt is not discharged by a certain time, a claim for interest cannot be brought within the purview of the Interest Act and consequently cannot be decreed. [P 52 C 1]

S. P. Ghose—for Appellants.

Gulzari Lal—for Respondents.

Judgment.—The only question to be discussed in this appeal relates to interest. The suit was brought by the plaintiff to recover the price of goods supplied to the defendants. The claim as laid included a claim for interest at 1 per cent. per mensem. One of the pleas raised in defence was that the plaintiffs were not entitled to claim interest as there had been no agreement for payment of the same. The Court of first instance, relying on the statement of one of the defence witnesses, thought that the plaintiffs were entitled to interest at the rate of 8 annas per cent. per mensem. In appeal the learned District Judge has refused the claim for interest. He has referred to the provisions of the Interest Act (32 of 1839) and says the plaintiffs have failed to bring their case within the purview of that Act. After hearing the argument of the learned counsel for the appellants I think the Judge's view must be maintained. It is not pleaded here that there was any written instrument containing an agreement to pay interest, nor again was it claimed by the plaintiffs that they had given any notice to the defendants of their intention of claiming interest in case the debt was not discharged by a particular time. It is true as argued by the learned counsel for the appellants, that there is a proviso to this enactment of 1839 whereby, notwithstanding anything contained in the Act, interest is to be payable in all cases in which it is now payable by law, the word "now" referring of course, to the year 1839. The only piece of evidence to which I have been referred for the purpose of showing that this case falls within the proviso is the statement of one Kishen Das, the witness whose evidence was relied upon by the Court of first instance. He is a son-in-law of one of the defendants and in his cross-examination stated as follows :

"I purchased tar from the plaintiffs and paid interest at the rate of ten annas per cent."

It would be difficult, in my opinion, to

found on this statement an agreement to the effect that the present transaction is one in which interest is payable according to law. I think the decision of the Court below is correct. The appeal fails, and is dismissed with costs to the respondents.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 52

WALSH AND RYVES, JJ.

Chandra Bhukhan Singh—Applicant.

v.

Rani Sujan Kuar—Opposite Party.

Civil Revn. No. 55 of 1919, Decided on 17th June 1919, from decision of Dist. Judge, Cawnpore, D/- 28th March 1919.

Guardians and Wards Act (8 of 1890), S. 41 (3)—Court is not competent to order delivery of property to minor's widow on his death.

A Court has no jurisdiction under S. 41 (3) to make an order on the death of a minor directing his guardian to deliver up the property papers and accounts in his possession to the widow of the minor. [P 54 C 2]

Narain Prasad Asthana — for Applicant.

Tej Bahadur Sapru and *Uma Shanker Bajpai*—for Opposite Party.

Ryves, J.—This is an application in civil revision to quash the order of the District Judge of Cawnpore, dated 28th March 1919, on the ground that it was passed without jurisdiction. It raises a question of difficulty and importance and appears not to be covered by authority. The order purports to have been made under S. 41 (3), Guardians and Wards Act, Act 8 of 1890.

The facts are as follows: In 1907 the present applicant, Kuar Chandra Bhukhan Singh was appointed under the Act guardian of the property of the minor, his nephew who had inherited a very valuable zamindari estate which it is admitted is impartible. On 23rd November 1918 the minor died. Up to that time there had been no suggestion that the guardian had failed in any way to do his duty. No sooner had the minor died, than litigation was started to determine who should succeed him. The two claimants were:

(1) The widow of the minor, the opposite party here; and (2) the applicant.

Both are claiming mutation of names in the Revenue Courts and the litigation is still pending.

On 6th March 1919 the widow of the minor filed an application in the District Judge's Court in which she stated that

"she was the sole heir of the minor and entitled as his widow to receive the entire property of the deceased minor."

She further stated that:

"she believed that the guardian had withdrawn a sum of about Rs. 36,000 from the Allahabad Bank, Limited, standing in the minor's name and appropriated the same to his own use. She therefore prayed that the said guardian be called upon to deliver all moveable property and cash and documents and render accounts of the period of his guardianship and be prohibited from using or converting the property of the deceased ward in any manner whatsoever."

She asserted that the immovable property was already in her possession. The Court thereupon issued notice to the guardian to show cause why the application should not be granted.

The guardian the applicant here in his reply claimed that he was the heir. He denied that he had in any way wrongfully dealt with any moneys belonging to the minor and stated that he had all along submitted accounts of his stewardship to the Court, the last accounts having been filed in July 1918. At the same time he protested against the Court's jurisdiction to pass the order prayed for against him as being beyond its jurisdiction. The Court made an inquiry of a very summary character, for I find that no evidence was recorded, and passed its order in the following terms:

"I grant the application so far as it asks for property, papers and accounts in the possession of the guardian. The latter cannot under S. 41 (3) be ordered to render accounts. For this a separate suit is necessary."

It may be noted here that the widow did not assert when the so-called misappropriation of the Rs. 36,000 had been made whether before or after the death of the minor. Nor has the Court come to any finding on this point. It says:

"It appears that he has drawn out in his own name some of the minor's money. He never informed this Court of his intention to do this."

I presume that this was admitted by the applicant, for, as I have said no evidence was taken. Assuming that this is a finding that the money standing in the minor's name had been withdrawn there is no finding as to when this was done, whether before or after the minor's death.

The learned Judge seems to me to have been influenced to some extent by taking into consideration what in his opinion

were the merits of the parties before him ultimately to succeed, for he says:

The question whether the widow or uncle is heir depends on the fact whether the uncle was joint with the deceased minor. That is to say, would have been a co-parcener with the deceased but for the estate being an impartible one, it being common ground that the deceased minor was owner of the property as the holder of an impartible estate. There is a presumption in favour of jointness and the mere fact that the uncle lived in a separate house from the minor for the sake of convenience will not of itself prove the separation which would debar him from succeeding. At the same time it appears to me clear from the order appointing the uncle guardian that there was no suggestion when he was appointed guardian that he was next heir to the property nor did he then say that his living separately was a temporary matter of convenience."

Such considerations seem to me wholly irrelevant in the present inquiry. The question as to who was the heir of the minor was one which the District Judge certainly could not determine in this inquiry.

Mr. Narain Prasad for the applicant does not contend that the guardian's liability to account for his administration of the minor's property was terminated by the death of the minor. All he contends for is that the order passed was without jurisdiction.

It is admitted that the decision of the question turns on the proper construction of S. 41 of the Act, and more particularly on sub-S. 3 of that section. The only question raised and the only one which I propose to deal with therefore is whether this particular order was one which the Court had jurisdiction to pass. In my opinion it was not.

Section 41 enumerates the circumstances under which the powers of a guardian terminate. We are only concerned here with paras. 2 and 3 of that section. The powers of a guardian of the property of a minor cease (a) on his (the guardian's) death, removal or discharge; (b) by the Court of Wards assuming superintendence over the property of the ward; or (c) by the ward ceasing to be a minor.

While it is clear that the powers of a guardian cease on his own death, para. (c) declares that his powers also cease by the ward ceasing to be a minor. I think these words must mean by the minor becoming a major—when he would have presumably reached years of discretion and would be able to look after his own interests. I do not think that the death of the minor was meant to put an end to

the responsibility of the guardian to account to the Court whose officer he is for his stewardship. To hold otherwise would be to suggest that all that a dishonest guardian has to do to escape the disciplinary power of the Court which appointed him would be to procure the death of the minor. His liabilities are apparently only terminated by his death, removal or discharge. Unless and until the guardian on the death of the minor applies to the Court and gets his discharge and thereby obtains the safeguard provided under sub-Cl. 4, S. 41, it would appear that he still remains accountable to the Court for his administration of the minor's property. But this question is perhaps irrelevant here, as the guardian does not claim that the death of the minor in any way puts an end to his liabilities, and I therefore express no opinion on the point.

Dr. Tej Bahadur supports the order of the Court by arguing that under S. 41 (3) the Court may for "any cause" act under the section and, that "any cause" includes the death of a minor. The chief difficulty in accepting this argument is the fact that the wording of the subsection and especially the concluding words, namely, "any past or present property of the ward," clearly contemplate that the ward was alive at the time (though he may have become a major) when the order was passed. But there is another serious difficulty to this argument. Orders under S. 41, Cl. 3, are admittedly final and are not open even to appeal. If an order such as was passed in this case was within the jurisdiction of the Court it might well be held to operate as *res judicata* between the parties. Dr. Tej Bahadur has to admit this, but says the difficulty would in practice be removed because a Court dealing with such matters under the Act would not pass final orders except in cases where the issue is very simple. In difficult cases, he argues, or where a detailed inquiry was necessary, it would refer the parties to the ordinary civil Courts. It seems to me that the legislature either gave the Court jurisdiction finally to decide such questions or it did not. I cannot think, in the absence of any direction to the contrary, that it left it open to the whim or idiosyncrasy of the Judge concerned to decide whether or not to try a question of the kind involved.

No authority under the Act has been

cited by either side nor have I have been able to discover any.

The case of *Narbadabai, In the matter of* (1) has been cited.

That was a decision under Act 20 of 1864 and is perhaps not quite decisive here because the language of the two Acts is not precisely similar, though they both deal with the guardianship of minors. But Act 20 of 1864 was one of the Acts which was repealed and superseded by the present Act. The legislature must therefore have been aware that the Bombay High Court had held that when a minor died during minority, the "administrator" of his estate, duly certificated, under S. 6 of that Act, could not be called upon to render accounts to the Court on the death of the minor, because the Court, as representing the minor, was *functus officio*, and yet took no steps in framing the present Act to provide for the case of the ward's death during his minority. From first to last the only section in the Act which seems to contemplate the consequences of the death of the minor during his guardianship is S. 37, which has no application here. There is nothing in this Act corresponding to S. 48, Act 4 of 1912 (The United Provinces Court of Wards Act).

On the whole I am satisfied that the order of the Court was without jurisdiction and must be set aside with costs. I would allow this application with costs.

Walsh, J.—I agree that this application must be allowed for the reasons stated. We are not deciding that the death of the minor puts an end to the jurisdiction of the Court. On the contrary I incline to agree with what my brother has said about the termination of a guardian's liability to the Court exercising jurisdiction under the Guardians and Wards Act. But it will be time enough to decide that question when the point arises.

By the Court.—The order of the Court is that the application is allowed with costs, and the order of the Court below must be set aside.

V.B./R.K. *Application allowed.*

(1) [1884] 8 Bom. 14.

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LINDSAY, J.

Bindesri and another—Defendants—Petitioners.

v.

Ganga Prasad—Plaintiff—Opposite Party.

Civil Revn. No. 54 of 1919, Decided on 26th November 1919, against order of Sess. and Sub-Judge, Mirzapur, D/- 27th February 1919.

Provincial Small Cause Courts Act (9 of 1887), Ss. 27 and 32 (2)—Small cause nature suit registered as ordinary suit before Munsif with no small cause powers but decided by Judge with those powers—Under S. 32 (2) latter Judge held bound to deal case as regular suit, and appeal lay.

A suit in the nature of a small cause instituted in the Court of a Munsif not invested with Small Cause Court powers and registered as an ordinary suit was tried as an ordinary suit by a Munsif who possessed Small Cause Court powers. On revision before the High Court it was contended that the decision of the Munsif ought to be regarded as a decision of a Small Cause Court and that it was not open to appeal:

Held: that under S. 32 (2), Provincial Small Cause Courts Act, the Munsif who finally dealt with the case was bound to try it as a regular suit and the procedure adopted by him was perfectly correct, and that consequently, his decree was not a final decree. [P 56 O 1]

A. C. Mitra—for Petitioners.

K. C. Mithal—for Opposite Party.

Judgment.—I have listened to the arguments in this case and have made up my mind that the application should be dismissed. I may say at once that the case being a case under S. 25, Provincial Small Cause Courts Act, I should not be disposed to interfere unless the law obliges me to. The suit was a suit for Rs. 47-4-0. It was tried in the Court of a Munsif, who admittedly was possessed of Small Cause Court powers up to a limit of Rs. 50. The Munsif however tried the suit as a regular suit and gave a decree in favour of the defendants. The plaintiff appealed and the appeal was heard by the Subordinate Judge of Mirzapur. He reversed the decision of the Court below and gave a decree in favour of the plaintiff. Now we have this application in revision, in which it is contended on behalf of the defendants that no appeal lay to the Court below and that the order of the Subordinate Judge is void as having been passed without jurisdiction. The way the case was put on behalf of the petitioners is this. It is said that the suit as framed was a suit exclusively cognizable by a Court of

Small Causes and that the Munsif who decided the case being a Munsif invested with the powers of the Small Cause Court it ought to be taken that his decision was the decision of a Court of Small Causes and was not therefore open to appeal. I take it as admitted that the suit was a suit ordinarily cognizable by a Court of Small Causes and that to this extent the case put forward by the petitioners is correct. Even then I should not be disposed to interfere in these proceedings in view of the fact that the case has been fully tried out and has not been disposed of in the summary way in which Small Cause Court cases are usually dealt with. The learned counsel for the petitioners however referred me to a judgment of this Court which is to be found reported as *Abdul Majid v. Bedyadhar Saran Das* (1). The case follows a Full Bench decision of the Madras High Court reported as *Kollipara Seetpaty v. Kankipaty Subbaya* (2). The view taken in this latter case was that where a small cause suit is tried by a Munsif on the original side and his decision is reversed in appeal by the Subordinate Court, the High Court is bound to set aside the decree in appeal as having been passed without jurisdiction.

The learned counsel for the opposite party however has been able, in my opinion, to put a different complexion on the facts, and after some argument it has been admitted before me that the statements of fact made by the learned counsel for the opposite party are correct. It seems that this suit was filed on 6th August 1918 and it was filed in the Court of the Munsif of Mirzapur. At that time the permanent incumbent had gone on leave and there was officiating in his place one Mr. Charu Chandar, who admittedly was not invested with the powers of a Small Cause Court Judge. The case was instituted in his Court and was necessarily registered as an ordinary suit. The case came on for trial in the month of November 1918. By the time Mr. Raj Rajeshwar Sahai, the permanent Munsif, had returned from leave. It is not disputed that this gentleman was invested at that time with the jurisdiction of a Court of Small Causes up to the pecuniary limit of Rs. 50. Mr. Raj Rajeshwar Sahai, as I have said, tried the

(1) [1917] 39 All. 101=37 I. C. 92.

(2) [1910] 33 Mad. 223=1 I. C. 542.

case as an ordinary suit and, in my opinion, that was the proper course for him to adopt. The suit was filed while his locum tenens, who was not invested with the Small Cause Court powers, was carrying on, and consequently, under the provisions of S. 32, sub-S. (2) Provincial Small Cause Courts Act, I think it was the duty of the Munsif who finally dealt with the case to try the case as a regular suit. If any authority on this proposition is required, it will be found in a ruling of this Court which appears to me to be exactly in point. That is the decision of a single Judge of this Court reported as *Jagmohan Lal v. Lakha* (3). I cannot distinguish the facts of that case from the facts of the case before me. Apart from this authority of this Court there are at least three other cases which support this view. One of these is to be found reported as *Mahima Chandra Sirdar v. Kali Mondol* (4); another case is *Hari Kamayya v. Hari Venkayya* (5) and another *Sambhu v. Ram Vithu* (6). It seems to me therefore that it is no longer possible to contend that there was any irregularity in the trial of the first Court. On the contrary the procedure of the Munsif was perfectly correct, and if he tried the suit out as a regular suit and did not exercise his powers in this particular instance as a Court of Small Causes, it follows that the petitioners here are not entitled to argue that the decree of the first Court was a final decree as provided by S. 27 Act 9 of 1887. On the authorities to which I have referred an appeal certainly lay to the District Judge and the result therefore is that I hold that there was no want of jurisdiction in the Court below to hear the appeal. The application fails and is dismissed with costs to the opposite party.

V.B./R.K. *Application dismissed.*

(3) [1911] 9 I. C. 264.

(4) [1908] 12 C. W. N. 167.

(5) [1903] 26 Mad. 212 (F. B.).

(6) [1904] 28 Bom. 244=5 Bom. L. R. 1008.

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STUART AND RYVES, JJ.

Barkatunnissa Begum—Plaintiff—Appellant.

v.

Mahboob Ali Mian and others—Defendants—Respondents.

First Appeal No. 265 of 1916, Decided on 28th July 1919.

(a) **Contract Act (9 of 1872), S. 126—Oral guarantee is as binding as written one.**

Section 126 makes no difference between an oral and a written guarantee, the former being as equally binding as the latter. [P 58 C 2]

(b) **Contract Act (9 of 1872), Ss. 140 and 141—Surety paying debts steps in shoes of creditor and can avail of every security.**

Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off and is entitled to the benefit of every security which the creditor had against the debtor at the time when the contract of surety was entered into. [P 58 C 2, P 59 C 1]

(c) **Limitation Act (9 of 1908), Art 132—Mortgage debt payable on demand—Limitation begins from date of execution—Rule applies even to transferee of mortgage rights.**

Where a mortgage is payable on demand, time begins to run from the date of its execution, and in order to succeed in a suit to enforce the mortgage the suit must be brought within twelve years of its execution; otherwise it will be barred by time. This rule applies equally to a transferee of mortgage rights, who in this respect can be put in no better position than the mortgagee. [P 59 C 1]

Motilal Nehru and S. M. Sulaiman—for Appellant.

Abdur Raooj, B. E. O'Connor, Ishaq Khan and Baleshwari Pershad—for Respondents.

Judgment.—Khurshed Ali Mian and his wife Mt. Latifunnissa executed the two mortgages, the subject of this appeal: (1) dated 14th June 1899, favour of Darbari Lal, for Rs. 3,000, and (2) dated 27th July 1900, for the same amount in favour of Darbari Lal and Lalta Pershad.

They had also executed two other mortgages, dated 20th November 1897 and 10th August 1899, in favour of Lalta Pershad alone. Those two mortgages formed the subject of the connected suit and are disposed of by our judgment in First Appeal No. 264.

The only reason for mentioning this fact is because the two suits were tried together, and the evidence was recorded in one only; and in order to appreciate correctly the evidence in this case, it is necessary to remember the circumstances of the other cases as well.

Khurshed Ali died in 1905 and in 1906 the creditors, that is Lalta Parshad and Darbari Lal, demanded payment. Mt. Latifunnissa asked for time, which the creditors agreed to give her, provided they got security for their debts. Latifunnissa appealed to her sister, Rani Barkatunnissa (plaintiff-appellant), who was a wealthy woman, and she agreed to secure all the four mortgage debts. On

their side the creditors agreed to reduce the rate of interest. All four mortgages were paid off by Barkatunnissa, according to the plaint, and these suits were brought by her to recover the amounts so paid from the sons and daughters of Khurshed Ali and Latifunnissa, who also is now dead. This suit was filed on 7th June 1915.

The defendants are three adult sons, three adult daughters and some minors under the guardianship of Mt. Hasina Begam. One of the adult sons, Mahbub Ali, admitted the claim and is the chief witness in the case. The two other adult sons and one of the adult daughters did not appear to contest the suit. Two adult daughters only, Mts. Hasina Begam and Anwari Begam, opposed the claim.

It is we think necessary to bear this circumstance in mind in judging the value to be assigned to the evidence in the case.

The contesting defendants in this case admitted the execution of the mortgages, but pleaded that the mortgages had been paid off by Mt. Latifunnissa herself out of her own funds, and that Mt. Barkatunnissa, in fact, paid nothing. But they go on to say that if the Court holds that Barkatunnissa made any or all of the payments she cannot recover them from the defendants, as the payments were merely voluntary, and therefore gave her no lien over the defendants' property.

The Court framed two main issues:

(1) Whether the plaintiff stood surety for payment of the money due under the two bonds in suit, and made payments as surety;

(2) Whether she can obtain a decree for sale.

The Court held that the plaintiff paid off the mortgage of 27th July 1900 on 12th October 1906 by a payment of Rs. 6,300, but that she did not do so as a surety and therefore cannot get a decree for this amount.

With regard to the second mortgage, the plaintiff claimed to recover seven items:

Rs. a. p.

1. 628 15 0 on 25th March 1908.
2. 606 7 0 on 17th March 1909.
3. 1,204 13 0 on 24th September 1910.
4. 2,441 0 0 on 17th June 1911.
5. 2,426 6 9 on 25th June 1912.
6. 1,376 0 0 on 15th January 1913.
7. 1,500 0 0 on 17th January 1913.

The Court below has held that all these payments were made (though it

has not discussed item 7 in its judgment), and apparently were made by money advanced by the plaintiff; but it held that, although there was no reason to suppose that Barkatunnissa advanced the money voluntarily, still as

"there was no privity of contract between the plaintiff and Darbari Lal and as she gave no guarantee to the latter, she did not become invested with the rights of Darbari Lal against the mortgaged property, and therefore she could not get a decree for sale."

It seems to have come to the conclusion that item 7 had not been proved, and held that inasmuch as item 5 could not be traced in the account books of the plaintiff, it could not be held with certainty that the plaintiff had paid it. In the result it gave plaintiff a simple money decree for item 6, for Rs. 1,376 with future interest, and held that the rest of the payments having been made more than three years before suit were irrecoverable, being barred by limitation.

The plaintiff has appealed and claimed to recover the whole amount.

Before discussing the law, it will be convenient to set out what we find to be the facts.

Khurshed Ali and his wife, though possessed of some property, made these four mortgages, between the years 1897 and 1900. They paid nothing towards either interest or capital. In 1906 the mortgagees began to press for their money, and then it was that Mt. Latifunnissa (her husband having died as said above) turned to her sister the plaintiff, for help. The evidence of what then happened consists of the testimony of Mahbub Ali (defendant 1, son of Latifunnissa) and Darbari Lal, and three documents: (1) a security bond executed by the plaintiff, dated 6th October 1906; (2) an agreement executed by Lalta Parshad, since deceased, dated 12th October 1906; and (3) a document executed by Darbari Lal, dated 12th October 1906. The only other person who is said to have taken part in the negotiations was Har Dayal, the karinda of the plaintiff, but he is dead.

Mahbub Ali swears that after Khurshed Ali's death, Lalta Parshad and Darbari Lal (it will be remembered that two of these four mortgages were in favour of Lalta Parshad alone, one in favour of Lalta Parshad alone, one in favour of Darbari Lal alone, and the other in their

favour jointly) pressed Mt. Latifunnissa for payment. Mahbub Ali stated:

"My mother said 'Give me time.' Thereupon the bankers said: 'If you give security for the money we will give you time and reduce interest as well.' My mother said: 'I will speak to my sister and if she accept it I will give the security.' My mother sent me to the plaintiff. I went and mentioned full particulars. Thereupon the plaintiff consented and said: 'Go and bring from the bankers the conditions of the security bond.' Thereupon, I came to Shahjahanpur and told the same to the bankers. They gave a draft of the conditions and I took it to the plaintiff who accepted it and executed the security bond. When I brought the security bond and gave it to Lalta Parshad, he and Darbari Lal, having seen it executed separate agreements with the stipulations that they would continue to charge interest in future, at the rate of 12 per cent per mensem, on the amount that was due up to that day.

Mahbub Ali has not been disbelieved by the Subordinate Judge; in fact his evidence has been accepted generally; he has not been in any way broken down in cross-examination and as his statement is against his own interest, we think it quite safe to act upon it. It will be remembered that his other two adult brothers and one adult sister have not contested the suit and therefore tacitly accept the plaintiff's version.

Darbari Lal's version is not quite the same, but his evidence is not very satisfactory because his memory seems to be defective. Thus, when shown the document executed by him on 12th October 1906 in which he agreed to reduce the rate of interest on the bond of 14th June 1899, (the other one having been that day paid off) he admits that it bears his signature beyond any doubt, but he says he has no recollection of ever having executed it. His words are: "I do not remember exactly if I executed such an agreement. I think there was a verbal agreement." But he admits that he accepted interest at the reduced rate from that date. He says he did not know Barkatunnissa, and never had any conversation with her which is probably quite true as she is a pardanashin lady. He says he does not know her karinda, although he admits that he had dealings with her and that her servants used to come to his shop. As to the plaintiff standing security for the payment of his one remaining mortgage, he says she did not. He did not require security as apparently the property mortgaged was sufficient security in itself. He admits that Mahbub Ali from

time to time made payments and that the mortgage was paid off by such payments.

Mahbub Ali says that Hardayal did enter into negotiations with Darbari Lal, but whether Darbari Lal had forgotten or whether Mahbub Ali is mistaken is not very important. The fact remains that on 12th October 1906 both Darbari Lal and Lalta Parshad agreed to reduce the rate of interest. Lalta Parshad alone required a security bond. Mahbub Ali says in corroboration of Darbari Lal, that as a large amount of money (Rupees 6,300) was paid to Darbari Lal, and only one mortgage for Rs. 3,000 in his name remained due, he (Darbari Lal) did not think the execution of a security bond to be necessary. It may well be that while Lalta Parshad to whom the large sum of Rs. 23,000 was still due on two mortgages required a security bond from Barkatunnissa, Darbari Lal considered himself already sufficiently secured, as he says, by the property hypothecated in his bond.

It seems quite clear that both Lalta Parshad and Darbari Lal were acting together in these negotiations, and we are satisfied in that Barkatunnissa guaranteed the payments of all these mortgages. Whether Darbari Lal was or was not aware of this (though we are inclined to think he was) seems to us immaterial and even if there was no privity of contract between Barkatunnissa and Darbari Lal, that is no bar to Barkatunnissa recovering from the defendants what she paid on account of the defendants' parents' debt if she is otherwise entitled to recover. It is admitted in argument that, at any rate the bulk of the money was paid by Barkatunnissa.

We have now to discuss Barkatunnissa's legal position. We find as the lower Court did that there was an oral guarantee given by Barkatunnissa to Latifunnissa, and that it was not voluntary. S. 126, Contract Act, makes no difference between an oral and a written guarantee. See also S. 187 of the Act.

We have now to consider the effect of Ss. 140 and 141 of the Act.

Under S. 140 it seems to us that when the surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off, and under S. 141 the surety is entitled to the benefit of every security which the creditor has against the debtor at the time

when the contract of surety is entered into. We have no doubt that Rani Barkatunnissa was fully informed about the mortgages, and that she agreed to pay up her sister's debts, and that the creditors for that reason agreed on a lower rate of interest being charged in the future. So far there is no difficulty.

The appellants' counsel claims that the plaintiff can take the benefit of both mortgages, and is entitled to a decree for sale of the properties hypothecated under both.

A difficulty at once arises with regard to the mortgage of 27th July 1900. That was payable on demand, and time began to run from the date of its execution. Barkatunnissa (plaintiff) paid it up in full on 12th October, 1906. Her suit was brought in 1915, that is to say, within twelve years of her paying it off, but long after twelve years of its execution. On consideration, we hold that she should have brought her suit on the basis of this security within twelve years of its execution and not having done so, her claim under this head is barred by time. We cannot see how she as a transferee of the mortgagee rights can be put in a better position than the mortgagee. She had approximately six years within which to sue; as she did not sue in this interval, we must hold that her present claim is barred, and in so far we accept the decision of the lower Court.

The same difficulty is not present in regard to the second mortgage. Payments were made yearly in reduction of both principal and interest up to 1913. The suit was brought in 1915 within three years of the penultimate payment, and the suit is therefore clearly within time.

We have therefore only to satisfy ourselves that the seven items claimed by the plaintiff as having been paid by her were in fact so paid. The learned counsel for the appellant plaintiff very frankly admitted that item 7 has not been brought home to the plaintiff as clearly as the others, and that therefore there may be a possible doubt whether in fact the plaintiff paid it. We therefore agree with the lower Court in not accepting this item.

The other items seems to us to be proved. The Subordinate Judge has not disbelieved Mahbub Ali, who said he paid them from the moneys of Barkatunnissa. The sums were undoubtedly paid and

there is no evidence that Mt. Latifunnissa paid them out of her own pocket. The learned Subordinate Judge, exercising perhaps undue caution, refused to credit Barkatunnissa with any item which was not clearly demonstrable from her books. We are however satisfied that all these items are shown in the plaintiffs' books. We took exception to one small item of about Rs. 125 in the other case, as not having been necessarily paid in reduction of the mortgage debt involved in that case, for the reasons given in our judgment in the connected appeal. On all the other disputed items we are satisfied that what happened was that a particular sum was paid to both creditors but entered in the plaintiff's books as a single debit.

We therefore think that the appeal must be allowed in part, and the decree of the Court be amended. It is therefore ordered and decreed as follows:

That the decree of the court below is modified to this extent: that in addition the plaintiff shall get a decree for items 1 to 5, inclusive, with future interest against all the defendants, and is entitled to bring the property hypothecated to sale in satisfaction of her decree. The appellant will get her costs and pay them in proportion to her success or failure in both Courts; costs in this Court include fees on the higher scale.

V.B./R.K. *Appeal partly allowed.*

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RYVES, J.

Mahadeo Sahu and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 489 of 1919, Decided on 13th November 1919, against order of Dist. Magistrate, Gorakhpur.

Criminal P. C. (1898), S. 476—District Judge discovering insolvent guilty of fraudulent transfers—District Magistrate initiating prosecution under S. 421, I. P. C.—Procedure held wholly illegal.

Upon an examination of the records of an insolvency proceeding the District Judge discovered that the insolvents and others had been guilty of fraudulent transfers. He brought the matter to the notice of the District Magistrate with a view to the persons being prosecuted under Ss. 421 and 421/114, Penal Code. Criminal proceedings were accordingly initiated against them. On revision:

Held: that the proceedings must be quashed, as there was no authority in the Criminal Procedure Code for the procedure adopted. [P 60 C 2]

Nihal Chand, S. M. Sulaiman and Shiva Prasad Sinha—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—The circumstances of this case are somewhat peculiar. Two persons Ramanand and Naurangi Lal applied in the Court of the District Judge of Gorakhpur to be declared insolvents as long ago as 8th October 1913 and were declared insolvents on 26th August 1914. A receiver was appointed, who reported on 31st March 1915 that certain property, among others in the possession of Mahadeo and Jagrup under the sale deed of 1st July 1911, was really the property of the insolvents and had been fraudulently transferred in order to defeat their creditors. The then District Judge of Gorakhpur found that the transfer was a fraudulent one, and this order was confirmed by the High Court on 15th May 1917 and the property was then sold by the receiver. Some time in May 1919 it appears that the file of the insolvency case was before the present District Judge of Gorakhpur. There is a docket on the record before me, dated 31st May 1919, which was sent by the District Judge of Gorakhpur to the District Magistrate of Gorakhpur. It starts :

"Sir, I have the honour to bring to your notice certain facts against Ramanand, son of Padarath, and Naurangi, son of Sheo Dihal, of Dhubra Police Station, Belghat, two insolvents, and Bindeshbri Sahu, son of Nepal Sahu of Maghar, Ram Charan Sahu, son of Gajadhar of Manikpore, Police Station Rawanpar, District Azamgarh, Jagrup Sahu, son of Sheodihal, Mahadeo Sahu, son of Sheodihal, residents of Maghar, Police Station Khalilabad, in Basti District, transferees from them."

It goes on to state various facts which apparently had come to the knowledge of the District Judge from the records of the insolvency case, but which were not of course known to him personally, and it then sets out several transfers which appeared to him from the record to have been fraudulent. It goes on to say :

"These fraudulent transfers, made with the intention of preventing the distribution of property according to law among the creditors of Ramanand and Naurangi, are offences under S. 421, I. P. C. Not more than three of these offences committed within one year can be tried at one trial. To simplify the case one transfer might be tried at one time. The strongest case is perhaps that of the transfer of 11th July 1911, whereby the shares in some seven villages were

said to be transferred to Jagrup and his brother Mahadeo for Rs. 2,900, of which Rs. 800 was due under a prior book debt and Rs. 2,100 was paid before the Sub-Registrar. Ramanand and Naurangi made the transfer, and Jagrup and Mahadeo, to whom it was made, should be prosecuted for abetment."

It goes on to give various other directions as to what evidence should be called and winds up as follows:

"I have the honour to ask you to take proceedings against the persons named by me on charges under S. 421, I. P. C., and S. 421/114, I. P. C. The case is one of importance in the interest of commercial morality and should be inquired into or tried by an experienced Magistrate."

It appears that on receipt of this document the learned District Magistrate transferred the case to the Court of the Joint Magistrate, Mr. York, who issued summons to the accused. They applied to this Court to quash the criminal proceedings and their application was admitted by a learned Judge of this Court, who ordered all proceedings to stay meanwhile. I do not understand under what section of the Criminal Procedure Code the District Judge of Gorakhpur made this report. It cannot have been made under the provisions of S. 476, Criminal P. C., because that section does not apply to a charge under S. 421 I. P. C. Inasmuch as the learned District Magistrate seems to have regarded this as an order under S. 476, I think all proceedings up to date must be quashed. But that does not end the matter. I am not prepared to hold that this document is not a "complaint" within the wide definition of the term in S. 4, Criminal P. C. In this view of the matter it will be open to the District Magistrate to take such further action as he may be advised after having followed the procedure laid down in Ch. 16 of the Code. Let the papers be returned to the District Magistrate with a copy of my order.

V.B./R.K.

Papers returned.

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RAFIQUE AND PIGGOTT, J.J.

Taimur Ali Shah and another—Plaintiffs—Appellants.

v.

Shah Mohammad Khan and others—Defendants—Respondents.

First Appeal No. 195 of 1916, Decided on 16th November 1918, from decree of Sub-Judge, Meerut, D/- 8th April 1916.

U. P. Land Revenue Act (3 of 1901), Ss. 111 (1) (b) and 233-K—Suit required to be filed by order under S. 111 not filed within time, but within extended time—Original order not being complied with civil Court's jurisdiction held barred.

In a partition case an objection was made which involved a question of proprietary title. The Assistant Collector required the objectors, under S. 111 (1) (b), to institute within three months a suit in the civil Court for the determination of that question. They failed to comply with this order, but obtained an extension of time, within which extended period they instituted the suit.

Held: that the original order of the Assistant Collector not having been complied with, the jurisdiction of the civil Court to entertain the suit was barred by S. 233-K. [P 61 C 2]

Pearey Lal Banerjee—for Appellants.

Harendra Krishna Mukerjee and Surendra Nath Sen—for Respondents.

Judgment.—This is an appeal by certain plaintiffs whose suit for a declaration has been dismissed by the trial Court virtually upon a finding that the cognizance of the civil Court is barred by S. 233-K, Land Revenue Act (Local Act 3 of 1901). In para. 4 of the memorandum of appeal which has been added by permission of this Court after the appeal had been filed, it is suggested that in any case not the entire suit, but only a part of it, is affected by the provisions of S. 233-K aforesaid. On examining the record we do not think that this plea is well founded in fact: the wording of para. 9 of the plaint is certainly involved and not as clear as it ought to be as to whether there were one or two claims for partition pending in the Revenue Court. The allegations in that paragraph however make it clear that the entire suit was one relating to the partition of a mahal or mahals, in respect of which partition proceedings were actually pending in the Revenue Court when the suit was filed. The suit was therefore barred by S. 233-K aforesaid, unless the civil Court had received jurisdiction to entertain it by reason of a proper order under S. 111, Cl. (b), passed by the Assistant Collector before whom the partition was pending, requiring these plaintiffs to institute a suit in the civil Court within the statutory period of three months. Now it is common ground that such an order had been passed by the Assistant Collector, namely, on 11th May 1915.

The present suit was filed in the civil Court on 31st August 1915 beyond the prescribed period of three months. So

far we are on sure ground. There are two decisions of this Court, one directly in point and the other covering it by implication. In *Banwari Lal v. Gopi* (1), a single Judge of this Court definitely held that a suit filed under circumstances like those of the present case, namely, after an order under S. 111 (1) (b), Land Revenue Act, had been passed, but beyond the period of three months prescribed by the said order, was not entertainable by the civil Court. The matter came again before a Bench of this Court in *Randhir Singh v. Bhagwan Das* (2). In that case the learned Judges pointed out that a suit had been filed within the period of three months prescribed by the order of the partition Court. It had been withdrawn with permission to bring a fresh suit and the fresh suit had been instituted after the said period of three months. The Court held that there had been a compliance with the order of the Court and with the terms of S. 111, Land Revenue Act, by reason of the presentation of the original plaint within the prescribed period. By implication the learned Judges held that, if this had not been so, the suit would not have been entertainable.

It is contended however that the present case is distinguishable by reason of certain proceedings which took place in the Court of the Assistant Collector after the prescribed period of three months had expired. We have had some difficulty in ascertaining precisely what those proceedings were. We find however that on 26th August 1915 there was presented to the Assistant Collector, on behalf of the present plaintiffs, an application supported by an affidavit. The affidavit stated certain reasons why the order of 11th May 1915 had not been complied with and asked for a fresh period of time within which to file a suit in the civil Court. This application raised a question which the Assistant Collector might have taken upon himself to consider and to determine, namely, whether he had jurisdiction to pass a fresh order under S. 111 (1) (b), after failure on the part of the persons concerned to comply with his previous order of 11th May 1915. The Assistant Collector however did not determine this point and did not take it upon himself to pass any formal order granting the pre-

(1) [1908] 30 All. 44=4 A. L. J. 713=(1907) A. W. N. 282.

(2) [1913] 35 All. 541=21 I. C. 654.

sent plaintiffs a fresh period of three months. What he directed the plaintiffs to do was to file their suit in the civil Court and to produce before him documentary evidence of the fact that they had done so. Apparently, when these plaintiffs did so, the Assistant Collector adjourned the partition proceedings, saying that he would await the decision of the civil Court. He seems to have thrown it entirely upon the civil Court to determine whether the plaint presented on 31st August 1915 was or was not entertainable in view of the plaintiffs' failure to comply with the order of 11th May 1915. In our opinion therefore the question of law which is sought to be raised by this appeal, namely, whether the Assistant Collector would have had jurisdiction to pass a fresh order under S. 111(1) (b) requiring the institution of the civil suit within a further period of three months, does not arise. Had such an order been passed by the Assistant Collector, the position would have been different.

The opposite party, the defendants to the present suit, would have had something against which they could have appealed to the higher Revenue Courts, and the matter might eventually have been disposed of by the Board of Revenue which, in the exercise of its very wide revisional jurisdiction, would beyond all question have been entitled to take into consideration the reasons given on behalf of the present plaintiffs for noncompliance with the order of 11th May 1915, and, if it thought proper, to substitute for that order a fresh order fixing a period of three months from date within which a civil suit might be filed. As the case now stands, the plaintiffs are unable to refer us to any order of the Assistant Collector, or of any Revenue Court of superior jurisdiction, which we can treat as an order under S. 111(1) (b), except the order of 11th May 1915, which was not complied with. On this state of facts we are satisfied that this appeal fails and we dismiss it accordingly with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 62

RICHARDS, C. J. AND BANERJI, J.

In the Goods of *D. MacIntyre*.

Testamentary Case No. 16 of 1917, Decided on 11th November 1918.

Will—Validity—Holograph written by domiciled Scotchman is valid will according to Scotch law though without witnesses.

A holograph writing proved to be in the handwriting of a person who at the time of his death was a domiciled Scotchman constitutes a valid will according to Scotch law, even though there are no witnesses to such writing. [P 62 C 2]

Facts.—David MacIntyre, Agent at Meerut of the Allahabad Bank, died at Meerut, and the Administrator-General of the United Provinces obtained from the High Court letters of administration to his estate as in the case of an intestate. Subsequently a document was discovered among the papers of the deceased to the following effect:

"Allahabad Bank Meerut 21st January 1913, any property which I possess to be divided equally between my three sisters Jessie Percy MacIntyre, Helen Anne MacIntyre and Mary MacIntyre, the survivor or survivors. D. MacIntyre."

The document was entirely in the handwriting of the deceased, and as he was a domiciled Scotchman, the Administrator-General was of opinion that, according to Scotch law, the document was a valid testamentary instrument. He accordingly applied to the Court for amendment of the letters of administration granted to him by annexing thereto, the will propounded. The Administrator-General proved the document to be in the handwriting of the deceased, and that the domicile of the deceased was Scotland. In support of the legal point as to whether according to Scotch law, the document was or was not a will, he placed before the Court the opinion of the writer to the Signet of Edinburgh, from which the following is an extract, viz:

"By the Common law of Scotland a holograph will is valid wherever made and needs no witnesses. The person founding on the deed as holograph must prove that it is so either by the evidence of persons who saw it written or by evidence as to handwriting which satisfies the Court."

Judgment.—Upon reading the papers before us, including the affidavit of James, W. Moncrieff Writer to the Signet, we are of opinion that the paper writing, dated 21st January 1913, is in the handwriting of the deceased D. MacIntyre, and that according to Scotch law it constitutes a valid will and that the said David MacIntyre was a domiciled Scotchman at the time of his death. We accordingly cancel the grant of letters of administration previously directed to be issued to the Administrator-General, and in lieu thereof direct that letters of administration with the aforesaid document of

21st January 1913, as the last will of David MacIntyre annexed, do issue to the Administrator-General.

V.B./R.K. *Order accordingly.*

A. I. R. 1919 Allahabad 63(1)

RYVES, J.

Bhanwar—Appellant.

v.

Emperor—Respondent.

Criminal Appeal No. 1046 of 1919, Decided on 12th November 1919, against order of Addl. Sess. Judge, Muttra, D/- 30th August 1919.

Penal Code (45 of 1860), S. 75—Previous conviction in Native State is outside S. 75.

A previous conviction in a Native State is outside the scope of S. 75. Where therefore a person admits such a previous conviction, it ought not to be considered. [P 63 C 1]

Govt. Pleader—for the Crown.

Judgment.—*Bhanwar* has been convicted by the learned Sessions Judge of Agra under S. 454, I. P. C., and under the provisions of that section, read with S. 75, I. P. C., has been sentenced to five years' rigorous imprisonment. There can be no doubt whatever on the evidence, which was believed by both the assessors and the learned Judge, that the accused did commit the offence with which he was charged; but with regard to the application of S. 75, I have great doubt. The accused admits two previous convictions, one under S. 411, I. P. C., and another under S. 407. Both these convictions were made by the Dig Nizamat in the Bharatpur State. I have no information as to the nature or constitution of this Court. The question is whether S. 75, as amended by Act 3 of 1910, contemplates a conviction by a Court of this kind. The point was considered in *Bahawal v. Emperor* (1) and it was held that a previous conviction held by a criminal Court in Bikanir could not come within the scope of the section. Under the circumstances I think S. 75 is not shown to be applicable in this case. Having regard to all the circumstances of the case, a sentence of three years' rigorous imprisonment will meet the ends of justice. With this modification I dismiss the appeal.

V.B./R.K.

Sentence reduced.

(1) [1913] 17 P. R. 1913 Cr.=20 I. C. 1007.

A. I. R. 1919 Allahabad 63(2)

TUDBALL AND RAFIQUE, JJ.

Bishambar Nath Singh—Defendant—Appellant.

v.

Basant Lal—Plaintiff—Respondent.

Second Appeal No. 515 of 1918, Decided on 19th December 1919, against decree of Dist. Judge, Allahabad. D/- 25th January 1918.

Pre-emption — Custom — Wajibularz restricting right of pre-emption between cosharer—Custom does not apply to owners of miscellaneous plots.

Where an entry in a Wajibularz gives a right of pre-emption to a cosharer in a zamindari in the case of a sale by another cosharer of his right, and expressly states that the owners of miscellaneous plots may sell as they please, the custom of pre-emption is inapplicable to such owners. [P 63 C 2, P 64 C 1]

Gokul Pershad and Kanhaya Lal—for Appellant.

R. K. Malaviya—for Respondent.

Judgment.—This a defendants's appeal. The property in suit is a bit of land lying within the limits of the village Yahyapur which forms part of the town of Allahabad. The plaintiff is a cosharer in the zamindari, sixteen annas mahal of Yahyapur, and he claims that he has a right of pre-emption in respect of this plot. Both the Courts below have decreed the claim. The defendant comes here on appeal and he urges that, on the face of the documentary evidence put forward to prove the case, the plaintiff has no right of pre-emption whatsoever as against him. The land in question is part of what is known as the hakkiput mutfurrika; that is to say, the miscellaneous plots within the boundary of the village. An examination of the khewat shows clearly that the zamindari part of the village now consists of an area of only 11 bighas 15 biswas; that the miscellaneous plots total to 26 bighas 4 biswas; and that the inhabited site covers 158 bighas 11 biswas. In the Wajibularz, on which the plaintiff depends, a right of pre-emption is given in Cl. 3, Ch. 1 clearly to a cosharer in the zamindari in the case of a sale by another cosharer of his right. In Ch. 3, Cl. 3, there is also a distinct statement that the owner of the miscellaneous plots have a right to sell their property as they please without the permission of the zamindar. The Court below appears to have overlooked this portion of the document and it is quite clear that the custom of pre-emp-

tion prevailing in the village is one only as among the owners of the zamindari, and the owners of the miscellaneous plots have a full right to sell their property to whom they please without even asking the permission of the zamindar, a right which they would not have had if the custom of pre-emption included them. In our opinion the appeal is a good one. We allow it and set aside the decrees of the Courts below. The plaintiff's suit will stand dismissed with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 64 (1)**

RYVES, J.

Udit Narain and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 624 of 1919, Decided on 13th November 1919, from order of Sess Judge, Allahabad, D/- 21st August 1919.

Criminal P. C. (5 of 1898), S. 356—Omission to record evidence in vernacular is irregularity vitiating trial.

Where a Magistrate omits to prepare a vernacular record of the evidence as required by S. 356, he commits an irregularity which vitiates the trial. [P 64 C 1]

*G. Banerji—for Applicants.**Lalit Mohan Banerji—for the Crown.*

Judgment.—Two persons, Udit Narain and Mahadeo, were convicted by a Magistrate of the First Class under S. 380 and sentenced to eight months' rigorous imprisonment. They appealed and their appeal was dismissed. Among the grounds taken in the lower Court it was urged that the trial was irregular because no vernacular record of the evidence was prepared as is required by S. 356. The learned Sessions Judge says:

"The objection does not seem to have any force. S. 355, Criminal P. C., empowered the Magistrate to make a memorandum of the substance of the evidence of each witness as the offence was one of those mentioned in Cl. (d), sub-S. (1), S. 260. The procedure adopted by him was in full conformity with the provisions of law."

In my opinion the learned Sessions Judge was mistaken. S. 355 applies to summons cases. This was not a summons case as shown by the fact that the sentence of eight months' rigorous imprisonment was passed. Secondly Cl. (d), S. 260 does not apply because the property said to be stolen was a sack of rice which probably was worth more than Rs. 50; in any case, as required by S. 263 (f), the value of the sack of rice has not been given. It seems to me that I have no alternative

but to set aside the conviction and order a fresh trial according to law. I order accordingly.

B.V./R.K.

*Conviction set aside.***A. I. R. 1919 Allahabad 64 (2)**

BANERJI AND PIGGOTT, JJ.,

Shyam Karan and others—Judgment-debtors—Appellants.

v.

Collector of Benares — Decree-holder—Respondent.

Execution Second Appeal No. 95 of 1919, Decided on 8th August 1919, from decision of Dist. Judge, Cawnpore, D/- 6th January 1919.

Civil P. C. (5 of 1908), S. 48 and Sch. 3, Para 11, (3)—Cl. 3 is wide enough to include period provided by S. 48.

The provisions of Cl. (3), para. 11, are wide enough to include the case of an application for the execution of a decree to which S. 48 of the Code applies. The words "period of limitation" in the clause are intended to apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Limitation Act and S. 48. [P 65 C 1,2]

P. L. Banerji—for Appellants.

R. Malcomson for A. E. Ryves—for Respondent.

Judgment.—This and the connected appeal arise out of execution proceedings in connexion with a simple decree for money passed on 18th December 1897. Various applications for execution were made between that year and the year 1906. In 1905 the property of the judgment-debtors in the District of Hamirpur was taken charge of by the Collector apparently under the provisions of S. 326, Civil P. C. of 1882. The management of the Collector continued down to 1917, when he released the property. On 4th April 1917 the Court of Wards, now in charge of the estate of the decree-holder, applied for attachment and sale of the property situated in the Hamirpur District. This application was resisted by the judgment-debtors on the ground of limitation. They contended that the application was barred by the three years' rule of limitation prescribed by the Limitation Act and also under S. 48, Civil P. C. The objection was allowed by the Court of first instance which held that having regard to the fact that more than twelve years had elapsed since the date of the decree, S. 48, Civil P. C. was applicable and the present application for execution could not be maintained. This decision has been overruled

cover any amount under it, I think we should follow *Chitturi Surayya v. Boddu Ramayya* (1), *Gour Chandra Das v. Prasanna Kumar Chandra* (2), and the case of *Powell v. Divtett* (3).

In fact Mr. Narayanamurthi conceded after some argument that as the terms of the contract were embodied in Ex. A, he was not entitled to recover damages independently of this document.

The only question then left was as to the appellant's (plaintiff's) right to recover the advance of Rs. 1,200, and this must be found for the appellant on the strength of defendant 1's admission and the reasons given above.

The result will be that the appeal will be allowed with proportionate costs in this and the lower appellate Court on this part of the plaintiff's claim and the decree of the District Munsif will be restored against respondent 1 and the second appeal dismissed with costs against respondent 2 who it is conceded has been unnecessarily made a party to this appeal.

Krishnan, J.—I accept the finding of the lower Court that the written contract Ex. A has been materially altered by the plaintiff without the knowledge and consent of defendant 1, the other party to it. On that finding we must hold that plaintiff is not entitled to enforce that contract: see *Powell v. Divett* (3), and that his suit so far as it is for damages, was rightly dismissed as it would be enforcing the contract to give him such damages.

It is however argued that plaintiff is nevertheless entitled to repayment of the Rs. 1,200, paid by him as an advance to defendant 1 and the claim is made under S. 64 or 65 Contract Act. The view of the lower appellate Court that Ex. A (1), the receipt given for the money is also rendered invalid by the alteration in Ex. A, does not seem to me to be supportable. It is only a receipt for the money paid. If the repayment of that money is claimed by way of enforcement of the contract no doubt plaintiff will be met by the objection based on its material alteration. But it is not so claimed. The lower Courts have found that defendant 1 did not perform the contract but on the other hand he committed breach of it. Though

plaintiff cannot take advantage of the breach to claim damages, he is not precluded from relying upon it and treating the contract as having become void under S. 65 and requiring the defendant to repay the money advanced to him. Illus. (c), S. 65, seems to indicate that the section is meant to apply also to cases where one party breaks a contract and the other party, in consequence of it, rescinds it. The material alteration though it prevents plaintiff from enforcing the contract does not seem to prevent him from rescinding it. No authority has been cited to show that it does. On the other hand the ruling in *Chitturi Surayya v. Boddu Ramayya* (1) would seem to support the view that the money advanced could be claimed back. Plaintiff would, therefore, be entitled to be paid back the Rs. 1,200 that he paid.

The second appeal, so far as it stands against respondent 2 is not pressed. I would therefore allow the second appeal against respondent 1 and reversing the decree of the Subordinate Judge restore that of the District Munsif. Plaintiff will pay and receive proportionate costs so far as respondent 1 is concerned in this and the lower appellate Court.

The second appeal is dismissed with costs against respondent 2.

S.N./R.K. *Appeal partly allowed.*

A. I. R. 1920 Madras 65

WALLIS, C. J. AND SADASIVA AIYAR, J.
K. A. C. C. T. Chidambaram Chetty
and others—Defendants—Appellants.

v.

V. R. K. R. Karuthan Chetty and
another—Plaintiffs—Respondents.

Civil Appeal No. 326 of 1918, Decided on 18th December 1919, against decree of Temporary Sub-Judge, Sivaganga.

(a) **Contract Act (9 of 1872), S. 263**—(Per Wallis, C. J.)—**Scope of—It does not apply to settlement between partners after dissolution—They are enforceable as agreements—Subpartner is entitled to accounts after dissolution and arrangements between principal partners are not binding on him.**

(Per Wallis, C. J.)—S. 263, deals with the continuing authority of the former partners to bind one another after dissolution and has no application to a settlement between the partners after dissolution which is binding on them by virtue of their agreement and not by virtue of this section and whether or not it is binding on the subpartner of one of them. A subpartner should ordinarily accept the accounts of profits agreed upon between the partners, but he is entitled to accounts after winding up, and arrangements

(1) [1915] 28 I. C. 57.

(2) [1906] 33 Cal. 812=3 C. L. J. 363=10 C. W. N. 783.

(3) [1812] 104 E. R. 755=15 East 29=13 R. R. 358.

between the principal partners after dissolution cannot be enforced against the subpartner. S. 31, English Partnership Act, should be applied in determining the rights and obligations of subpartners in India. [P 66 C 2]

(b) Contract Act (9 of 1872), S. 263—(Per Sadasiva Aiyar, J.) — Subpartners must accept accounts taken between partners — Position of assignee from partners stated — Assignor partner becomes agent of assignee and his acts unless they are vitiated by mistake or fraud are binding.

(Per Sadasiva Aiyar, J.)—The law in India is the same as in England, that subpartners must ordinarily accept the accounts taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which the accounts are taken. The assignee of a share (whether completed or only by way of mortgage) from one of two partners cannot claim to interfere with the business so long as it is a going concern. The assignor stands in the position of agent or trustee for the assignee and any settlement of accounts made by him prior to dissolution and up to the date of dissolution is binding in the same manner on the assignee as on the assignor. But, just as and to the extent that the assignor can surcharge and falsify on the ground of mistake or fraud in the settlement, the assignee may also do so. After dissolution also a fair settlement by the partners would be binding on their assignees, but not so a fraudulent or collusive settlement. [P 69 C 2]

(c) Civil P. C. (1908), S. 11—Subpartner not necessary party—Finding held not res judicata.

Where a Court has recorded a finding that a certain party defendant before it is a subpartner and the appellate Court before which no objection is taken to the finding dismisses the suit on the ground that, assuming him to be a subpartner, he is not a necessary party, the finding is not res judicata in a subsequent suit. [P 69 C 1]

*T. Rangachariar, T. Narasimha Aiyangar and N. S. Rangaswami Aiyangar—*for Appellants.

*K. Srinivasa Aiyangar, C. S. Venkatachariar and V. K. Srinivasa Aiyangar—*for Respondents.

Wallis, C. J.—I agree with the order proposed by my learned brother, whose judgment I have had the advantage of reading. I agree with him that there is no res judicata in this case on any view and it is therefore unnecessary for me to consider whether the doctrine of res judicata has any application to the case seeing that the former suit was dismissed as against the subpartners on the ground that, assuming them to be such, they were not proper parties to that suit: as regards the question whether the settlement Ex. 3, made between the plaintiff and his partner C. V. T. of the dissolution of the partnership is binding on the present defendants as his subpartners, assuming them to be such, I am of opinion that it

is not. S. 263, Contract Act, the language of which clearly resembles that of S. 38, Partnership Act, 1890 no doubt provides that the right and obligations of the partners continue in all things necessary for the winding-up of the partnership. That section deals, in my opinion with the continuing authority of the former partnership to bind one another after dissolution and has no application to a settlement between the partners after dissolution which is binding on them by virtue of their agreement and not by virtue of this section and whether or not it is binding on the subpartner of one of them.

The question whether such a settlement is binding on the subpartner against the principal partner gives rise to different considerations. The Contract Act, 1872, does not deal specifically with the case of subpartners except so far as by S. 263, it prohibits the introduction of a new partner into a firm without the consent of all the partners, and in my opinion it is dealt with by S. 31, English Partnership Act, 1890. I can see no reason why the rules laid down by the legislature in that Act, which was drafted with great care and with the assistance of eminent lawyers, should not be applied in this country where our Contract Act is silent, especially when they appear to merely give effect to the earlier decisions. I can find nothing in the Contract Act to warrant us in adopting a different rule. Under S. 31 an assignee from a partner, which term includes a subpartner cannot interfere in any way in the management of the business and must accept the account of profits agreed to by partners. Otherwise a new partner would, in effect be introduced into the business by one partner without the consent of the other partners and the continuance of the partnership would be endangered. If any one chooses to take an assignment of a share in a partnership, he must accept it subject to the restrictions which are necessary for the carrying on of the partnership business, one of which is that he must accept the accounts of profits agreed upon between the partners. The same considerations do not apply after the dissolution of the partnership and there are not the same difficulties in the way of allowing the subpartner to enforce his full rights against the assigning partner

and, accordingly S. 31 entitles him, for the purpose of ascertaining his share, to an account as from the date of dissolution. As held by Vaughan Williams, L. J., in *Watts v. Driscoll* (1), an assignee would be entitled to such an account independently of S. 31 which only affirms his right to it. As pointed out by Rigby, L. J., in the same case, there would be no equity in enforcing on the assignee of one partner a bargain entered into between the partners after dissolution which might involve gross injustice to the assignee and might have been entered into for that very purpose. My experience of partnership suits leads me to the opinion that the rule is at least as necessary in this country as in England and that the opposite rule would operate as a strong inducement to commit fraud and would frequently result in very questionable settlements, such as that in the present case, being entered into between the partners to the prejudice of the subpartners. I am therefore of opinion that the subpartner is entitled to an account under the rule embodied in S. 31 as interpreted in *Whetham v. Davey* (2), *Watts v. Driscoll* (1) and *Bonnin v. Neame* (3). What I mean is that, in the absence of any settlement between the partners before dissolution, which of course would be binding on the subpartner, the subpartner after the dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims as in *Whetham v. Davey* (2), as, without such an account, it would be impossible to say what he was entitled to.

Sadasiva Aiyar, J.—Defendants 2 to 5 are the appellants. Defendant 4 is the son, and defendant 5 is the grandson, of defendant 1 who died after suit. Of the five plaintiffs plaintiffs 2 to 5 are the undivided sons of plaintiff 1. I shall speak shortly of plaintiff 1 as the plaintiff hereinafter.

The suit was brought for the recovery of the contribution from the defendants in the following circumstances:

(1) The plaintiff and one C. V. C. T. Chidambaram Chetty (hereinafter called C. V. C. T.) carried on money-lending business as partners, the business being

conducted at Paungde, in Lower Burma, the plaintiff's share being 10/16 and C. V. C. T.'s share being 6/16.

(2) Out of the plaintiff's ten shares he assigned three shares, one to each of the defendants 1, 2 and 3 as his subpartners for consideration. (Defendants 1 and 2 denies that they were subpartners but defendant 3 admitted that he purchased one share from defendant 1).

(3) The business in Lower Burma ended in a loss and the plaintiffs instituted Original Suit 293 of 1912 against C. V. C. T. (and his sons) and also against the present defendants 1 to 3 (defendants 8 to 10 in that suit) for dissolving the firm and for obtaining the usual appurtenant reliefs. The Ramnad Sub-Court passed a preliminary decree dissolving the firm from 20th February 1914 (the date of that decree) and directing the taking of accounts after it gave the finding that the present defendants 1 to 3 were the plaintiff's subpartners each for one share as alleged by the plaintiff.

(4) On 4th July 1914 the plaintiff and C. V. C. T. agreed upon a statement of accounts filed in the Ramnad Sub-Court according to which statement nearly Rs. 2,54,000 was agreed to be the total loss incurred by the firm. That Court—in its final decree passed on 15th July 1914, held each of the present defendants 1, 2 and 3, liable to pay Rs. 15,872-8-0 to the plaintiff (their principal partner) for their respective 1/16th shares. The total sum payable by all the three was thus Rs. 47,000 odd.

(5) Meanwhile the present defendants 1 to 3 (then defendants 8 to 10) had filed Appeal Suit No. 197 of 1914 against the preliminary decree of the Sub-Court of Ramnad and they afterwards filed three separate appeals against the final decree. The principal grounds in these appeals were:

(a) There is no evidence that defendants 8 and 9 (the present defendants 1 and 2) are subpartners. (b) The lower Court ought to have dismissed the suit against defendants 8, 9 and 10 if they were only subpartners and as soon it was found that the plaintiff's case that they were principal partners was not made out. (These two grounds are the principal grounds of attack against the preliminary decree). (c) The statement of accounts, Ex. 3, filed by the plaintiff and

(1) [1901] 1 Ch. D. 294=70 L. J. Ch. 157=84 L. T. 97=49 W. R. 146=17 T. L. R. 101.

(2) [1885] 30 Ch. D. 574=53 L. T. 501=33 W. R. 925.

(3) [1910] 1 Ch. D. 732=79 L. J. Ch. 388=102 L. T. 708.

C. V. C. T., is no evidence against defendants 8 to 10. The plaintiff and C. V. C. T. acted collusively and fraudulently in accepting each other's statements on 15th July 1914 and defendants 8 to 10 had no knowledge or opportunity to object to Ex. 3. (This was the principal ground of attack against the final decree.)

(6) The High Court allowed the appeals of the present defendants 1 to 3 by the judgment in Execution Appeal No. 4, dated 14th April 1916 (Oldfield and Sadasiva Aiyar, JJ.). I shall extract the material passages in the judgment pronounced by Oldfield, J., and concurred in by the other learned Judge:

"The preliminary decree passed decided that they (defendants 8 to 10) were subpartners and so far no objection has been taken* * *. The argument for defendants 8 to 10 is shortly that having no rights or liabilities in connexion with the firm or any of its members except the plaintiff, they have no concern with the taking of the accounts between its members and cannot be bound by it and they should therefore have been dismissed from the suit as soon as the decision against their position as partners was reached.* * *. It is urged (contra) that defendants 8 to 10 were either necessary or proper parties because multiplication of proceeding would be avoided if the plaintiff's rights or liabilities in the partnership were determined once for all in a manner which would be binding on defendants 8 to 10 as well as C. V. C. T. since whether or no defendants 8 to 10 were directly liable for any proportion of the partnership liabilities. Such determination would be necessary in the adjustment between them and plaintiff 1. This is not in my opinion sustainable. There is nothing regarding the relations between the subpartners and partners in the Contract Act. S. 31 however of the English Partnership Act provides that the assignee of a share in a partnership is entitled "only to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of profits agreed to by the partners." The assignee is "in case of a dissolution of the partnership entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and other partners and for the purpose of ascertaining that share to an account as from the date of the dissolution." And this may be taken as the law in India since it is well supported by authority. * * *. The result is that subpartners must ordinarily accept the account taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which it is taken."

For these reasons the learned Judge decided that defendants 8 to 10 were neither necessary nor proper parties to Original Suit No. 293 of 1912, allowed the appeals and dismissed the plaintiff's suit so far as defendants 8 to 10 were concerned. The result was that the direc-

tion in the final decree that each of these three defendants should pay Rs. 15,800 and odd to the plaintiff was also set aside. The judgment was, as I said before, pronounced on 14th April 1916. The present suit was brought on 21st July 1916 for recovery of the total of three items of Rs. 15,800 and odd or Rupees 47,617-6-9 with compound interest with six months' rests from 20th February 1914, jointly and severally from the defendants.

The principal issues framed in this suit are issues 1, 2, 4, 5, 7 and 8 which are as follows:

(1) Whether defendants 1 and 2 were subpartners of plaintiff 1 in the V. R. K. R. firm mentioned in the plaint?

(2) Whether defendants 1 and 2 are precluded from raising the plea that they are subpartners by reason of the decision in Original Suit No. 293 of 1912 on the file of the Ramnad Sub-Court and Appeal Suit No. 197 of 1914 on the file of the High Court of Madras?

(4) Whether the statement of accounts showing the losses is fraudulent and collusive?

(5) What are the accounts to be taken and from what date are they to be taken?

(7) Whether plaintiffs are entitled to a joint decree against all the defendants?

(8) Whether plaintiffs are entitled to any and if so what interest?

The compound interest claimed with six months' rests was disallowed by the lower Court on issue 8 and simple interest at 6 per cent was allowed from the date of the preliminary decree, that is, 20th February 1914, in the former suit of 1912. On issues 1 and 2 the lower Court held that the question whether defendants 1 and 2 were subpartners of the plaintiff was res judicata against the contention that they were not such subpartners by the decision in the former suit though that suit was dismissed by the High Court as against them. Defendant 3 had admitted even in the former suit that he was subpartner for 1/16th share. On issues 3, 4 and 5 the lower Court held that the common statement, Ex. 3, filed in the former suit by the plaintiff and C. V. C. T. was not shown to be fraudulent or collusive that that statement was binding upon defendants 1 to 3 and that the defendants are therefore liable to contribute towards the losses of the firm as found in the final decree in that suit and also to contribute towards the subsequent payments found to have been made by the plaintiffs to partnership creditors. On issue 7 the Subordinate Judge held that the plaintiff was en-

titled only to a separate decree against each of defendants 1 to 3 for Rs. 15,000 and odd and interest and not a joint decree for Rs. 47,000 and interest as claimed in the plaint.

The questions we have to consider in this appeal are: (1) whether defendants 1 and 2 were subpartners of the plaintiff and whether the lower Court was right in holding that the question was res judicata by the decision in the previous suit of 1912; (2) whether the defendants are bound by the statement of accounts, Ex. 3, agreed upon between the principal partners, the plaintiff and C. V. C. T., and filed by them on 14th July 1914, or are they entitled to have the accounts of the partnership retaken as regards the assets and liabilities as they stood on the date of dissolution, namely, 20th February 1914.

As regards the first point, it seems to me difficult to hold that the judgment (Ex. A-4) of this Court in the appeal in the former suit intended to decide finally that defendants 1 and 2 were subpartners of plaintiff. It only recited that no objection was taken before the learned Judges to the decision of the lower Court that they were subpartners and then it proceeded to decide the appeal on the footing that they were subpartners and then held finally that they were neither necessary nor proper parties on that footing. I am myself inclined to take a very liberal view so as to extend the bar of res judicata as far as possible: see *Rama Krishna Naidu v. Krishnaswami Naidu* (4). But I do not think that the intention of the parties, or of this Court, to obtain or give a final decision on that question when it was before the High Court on appeal in the former suit is so clearly made out as to enable me to hold that, notwithstanding that it was unnecessary to decide that question for the disposal of the appeal, this Court did so decide it in a final manner and that decision is therefore res judicata. The case has therefore to go back for a fresh decision on the merits after taking evidence on this question.

The remaining point for decision is, whether the statement, Ex. 3, filed by the plaintiff and C. V. C. T., in the former suit, is binding on the defendants. On this question, learned arguments, citing English decisions mainly based on

Cl. (2), S. 31, English Partnership Act, were addressed to us and I think that the law governing partnership transactions is laid down with sufficient clearness in the Contract Act itself. The assignee of a share (whether completed or only by way of mortgage) from one of two partners not having any privity of contract with the other partner, can, of course, not claim to interfere with the business so long as it is a going concern. The assignor stands in the position of a trustee or agent for the assignee and any settlement of accounts made by him prior to dissolution, and up to the date of dissolution, is binding in the same manner on the assignee as on the assignor. But just as and to the extent that the assignor can surcharge and falsify on the ground of mistake or fraud in the settlement, the assignee may also do so. After dissolution, according to S. 263, Contract Act, the rights and obligations of the partners continue in all things necessary for the winding-up of the business of the partnership. If, for the purpose of such winding-up, the assignor settles accounts with his partner in a proper manner, it seems to me, on principle, that such settlement should be binding on the assignee, just as and to the extent that it is binding on the assignor subject, of course, to the right to surcharge and falsify for proper causes shown. Any fraudulent or collusive settlement of accounts made by the assignor is, of course, not binding on the assignee.

If there are English decisions which imply that a settlement made by the assignor after dissolution of partnership for the purpose of winding it up is in no way binding on the assignee, I do not feel myself bound by those decisions and I respectfully differ from them. The observation in the case in *Williams v. Pole* (5) rather seems to show that even in England, the English Court has the power to bind the assignee by such a settlement of account made by the assignor in certain circumstances. I do not think there is anything even in S. 31, English Partnership Act, which gives the assignee an unconditional right to have the accounts completely retaken in those circumstances, and the observations tending to an opposite conclusion (if they really tend to such a conclusion, a matter about which I feel some doubt) are based, in

(4) [1919] 52 I. C. 34.

(5) [1873] 21 W. R. 252=28 L. T. 292.

my opinion, on a rather narrow view of the meaning of Cl. 2, S. 31, Partnership Act, and seem to have ignored the provisions of S. 38, of the English Partnership Act corresponding to S. 263, Contract Act. However, I express my opinion on the English Act with very great diffidence as my knowledge of the history of bankruptcy legislation in England is almost negligible. If, as I hold, the assignor is a trustee or agent of the assignee, I do not see why the assignor's partner should not settle accounts bona fide with the assignor and why his right to so settle should be restricted by an assignment made without his consent.

The question therefore is whether the joint statement of account, Ex. 3, filed on 14th July 1914 by the plaintiff and C. V. C. T., is a bona fide settlement or whether it is fraudulent and collusive.

On this question I feel constrained to differ from the finding of the lower Court. The accounts of the partnership were kept by the salaried agent Olagappa Chetty at Paungde in Lower Burma and were in his possession till 23rd March 1909. On that date Olagappa Chetty and plaintiff went before mediators at that place and signed the agreement, Ex. 4, in their presence. That document provides that the plaintiff should make himself liable to and pay Rs. 8,000 due to certain persons (from whom Olagappa had borrowed money on his own personal credit on hand loans) within 12th April 1909, that Olagappa should in his turn write up the accounts properly and prepare the ayinthokai account before the same date (12th April 1909) and that, if the plaintiff pays up Rs. 8,000 to the creditors before 12th April, the promissory notes, documents, jewels, decrees and documents should be put into plaintiff's possession by Olagappa. It is the case of the plaintiff that he did pay the sum of Rs. 8,000 according to the said agreement: see also plaintiff's statement of account, Ex. 2. It is difficult to believe that he so gave Rs. 8,000 out of his own pocket without getting back the account books and ayinthokai statement from Olagappa. Olagappa died in 1911, that is, two years after the date of Ex. 4. The plaintiff never made any demand on Olagappa for delivery of the ayinthokai accounts before Olagappa's death. The plaintiff's story that he did not get back

the accounts is therefore not believed by me. In a document, Ex. 5, dated 13th April 1909, signed by the plaintiff, he says:

"As I have received from you all the accounts and on demand deeds of the firm at Paungde in which you had been conducting agency business on our behalf under the vilasam of V. K. (which is the plaintiff's own vilasam) no connexion exists between us and yourself in respect of the said firm. Should the other partners make demands on you, I shall not only be answerable for the same, but also pay any costs which you may incur thereby As I have received from you free of all encumbrances all the accounts and on demand deeds by returning to you the salary chit which you had given there shall be no connexion between you and ourselves in future."

The plaintiff's case is that he signed the document, Ex. B, without receiving the account. None of the arbitrators who settled the accounts between the plaintiff and Olagappa Chetty have been called on the plaintiff's side to prove that, notwithstanding the acknowledgment made by him in Ex. 5, he did not receive the accounts from Olagappa. Reliance is placed on the plaintiff's side on a telegram Ex. K. sent to the plaintiff by C. V. C. T. (the other partner) on 23rd August 1909. It is an obscure telegram which is as follows;

"Is Olagappa bringing account books with him or has not by post reply without delay immediately."

As far as I could see, the meaning seems to be "Is Olagappa bringing account-books or is he not?" It is argued for the plaintiff that if the plaintiff had received the account-books from Olagappa in April 1909, according to Exs. 4 and 5, at Paungde, C. V. C. T. would not have sent the telegram from Karaikudi, Madura, to the plaintiff (who was then in a place in Burma) about the accounts as if Olagappa had the books with him. On the other hand, it seems to me that this telegram shows that C. V. C. T. knew that the plaintiff had control over the account books. It is probable that C. V. C. T. asked the plaintiff by a letter to send the account-books through Olagappa who was then going over to British India shortly and that therefore C. V. C. T. sent the telegram addressed to the plaintiff to send the accounts through Olagappa. The plaintiff has very cleverly suppressed the letters which passed between him and C. V. C. T. or between him and Olagappa in connexion with all these matters, and contends that

the accounts must be either with C.V.C.T. or must have been with the deceased Olagappa, and if they had remained with the latter till his death it is not known what Olagappa had done with them or where the accounts now are. In the Suit No. 293 of 1912, C.V.C.T. and the plaintiff accused each other of suppressing the accounts; the plaintiff stating that Olagappa Chetty had fraudulently delivered the accounts to C.V.C.T., while C. V. C. T. stated that the plaintiff had received all the accounts from Olagappa, the plaintiff having gone over to Paungde specially in order to remove Olagappa from his position as agent and to conduct the business himself.

Though the plaintiff and C. V. C. T. accused each other of suppressing the accounts, neither of them produced the accounts before the Court and quietly, behind the back of the present defendants, (alleged subpartners), and while the defendants were absent in Madras for filing their appeal against the preliminary decree, made up their differences and filed the common statement, Ex. 3, on 14th July 1914. The plaintiff and C.V.C.T. in March 1914 (see Exs. 2 and 2-2) had filed their respective separate statements, but as the plaintiff was charging C. V. C. T. with having received Rs. 40,000 worth of cash, jewels and documents from Olagappa and C. V. C. T. was denying it, and as C. V. C. T. was, on his side, charging the plaintiff with suppression of accounts, and with making unfounded claims, the matter had been adjourned by the Court to 15th July 1914 for further hearing in order to appoint a commissioner to go through the accounts and to prepare the necessary statements, in view to a final decree. The enquiry before a commissioner was however burked by C. V. C. T. and the plaintiff and they admitted the correctness of the figures in their respective account statements, Ex. 2 and 2-A, except in the matter of the rate of interest claimed and the plaintiff gave up his contention that C.V.C.T. had obtained from Olagappa cash, jewels and documents (including, of course, the account books) worth Rupees 40,000. It is clear to my mind that the account-books must have been either with C.V.C.T. or with the plaintiff on 14th July 1914, and that they must have, when they settled the matter on 14th July 1914 been in common control and possession of those accounts. Having regard,

again, to the plaintiff's admission in Ex. 5, I have very little doubt that the accounts have been with the plaintiff from April 1909. It is said that Ex. 5 was prepared in March on the date of Ex. 4 itself but was postdated as 13th April. Reliance is placed on the recital in Ex. 4 that the salary chit of Olagappa should be returned to Olagappa on his giving up the accounts, whereas the salary chit, Ex. S, was not so given. I am not prepared to believe the plaintiff's statement about the antedating of Ex. 5 or that the agreement written on a five-rupee stamp-paper mentioned in Ex. 4 is the ten-rupee stamped agreement, Ex. 5. The salary chit, Ex. S, may have been obtained from Olagappa before his death or from Olagappa's heirs afterwards and not necessarily from the arbitrators none of whom has been examined.

The plaintiff, as I said before, stood in the position of a trustee and agent to defendants 1, 2 and 3 (assuming of course for argument sake that defendants 1 and 2 also were like defendant 3 his subpartners and not mere strangers). The duty of showing, especially after quarrels had arisen between him and defendants 1 to 3 at the very commencement of the suit of 1912, that a settlement made by him on their behalf also in July 1914 was a proper and bona fide settlement, lies, in my opinion, heavily on him. He is bound, as between himself and defendants 1 to 3, to keep and submit "clear and accurate accounts" and to furnish them with full and accurate information. Not only has he not proved that it was such a bona fide settlement, but his suppression of the partnership accounts which are in his possession and the suspicious haste with which he and C. V. C. T. agreed with each other to admit each other's statements [the plaintiff even withdrawing Appeal No. 199 of 1912, which he had himself filed against C. V. C. T. and his sons impugning C. V. C. T.'s claims (see Ex. 9 (a))] clearly indicate, in my opinion, that C. V. C. T. and the plaintiff colluded against the present defendants (then defendants 8 to 10) and that Ex. 3 does not represent a bona fide settlement of accounts between the principal partners.

It is argued for the plaintiff that, as Ex. 3 made the plaintiff and the defendants liable to pay Rs. 29,890-10-10 to C. V. C. T. the statement of account was *prima facie* bona fide as the plaintiff had

no motive to put himself under liability to C.V.C.T. to pay him Rs. 29,890-10-10 besides Rs. 7,308-5-8 mentioned in Ex. 3 as due to other creditors, total nearly Rs. 37,200. But Ex. 3 shows that, if that account be accepted as correct, the plaintiff could recover Rs. 47,600 odd from the defendants, thus making a profit of Rs. 11,400. The plaintiff and C. V. C. T. had only to collusively agree to admit each other's claims against the partnership, provided those claims are both in excess of the amounts really due to them in proportion to their respective shares Nos. 6 and 10, and the sum due to C. V. C. T. will still be Rs. 29,890-10-10 assuming that this was really due to C. V. C. T. from the partnership and was really paid by the plaintiff to him. To illustrate this, I shall put the following case. Instead of the amount due to the plaintiff being Rs. 1,21,525 and the amount due to C. V. C. T. being Rs. 1,25,125 as stated in Ex. B, if the amount due to the plaintiff had been Rs. 50,000 only and the amount due to C. V. C. T. had been Rs. 82,225 it will be found that even then the same sum of Rs. 29,820 will be due to C. V. C. T. Thus the plaintiff had only to admit Rs. 42,900 more as due to C. V. C. T. than was really claimable by the latter and C.V.C.T. had to admit Rupees 71,525, more than was really claimable by the plaintiff as due to the plaintiff and C. V. C. T. would still get his Rs. 29,000 (which I shall assume to be due to him), while the present defendants could be made liable for Rs. 47,000 odd though their actual liability will be far less if the true amounts due to the plaintiff and C. V. C. T. were only Rs. 82,225 and Rs. 50,000 respectively.

In the result the lower Court's decision based upon the preliminary findings as to *res judicata* and as to the bona fide character of the settlement under Ex. 3 will be set aside and the case will be remanded to the Subordinate Judge for fresh decision on the merits after directing the plaintiffs to produce the accounts in their possession. Costs hitherto will abide the result. The court-fees on the appeal memo. will be refunded to the appellants.

S.N./R K.

Appeal allowed.

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SESHAGIRI AIYAR AND MOORE, JJ.

Venkamamidi Balakrishnayya and another—Defendants 1 and 2—Appellants.
v.

Venkamamidi Venkata Triambakam and another—Plaintiffs—Respondents.

Second Appeal No. 1754 of 1918, Decided on 13th November 1919, against decree of Temporary Sub-Judge, Guntur, in Appeal Suit No. 237 of 1917.

(a) Hindu Law—Partition—Shares — Partition between father, adopted son and subsequently born natural son—Adopted son gets one share and others get eight shares—But in collateral succession he gets equal share.

In a partition of joint property between a Hindu father, his adopted son and a subsequently born natural son the father and the natural son would between them be entitled to eight shares and the adopted son to one share.

In a partition inter se between the members of the family, the rule of Vasista is applicable that the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. (*Hindu law texts discussed*): 43 Cal. 944; A. I. R. 1918 P. C. 192; A. I. R. 1915 P. C. 41 and 38 I. C. 244, Dist. [P 75 C 1]

(b) Practice—Abandonment — Parties can give up plea.

On a question of disputed facts it is within the competence of the pleader or parties to give up an issue: 25 Mad. 367 (P. C.), Foll. [P 73 C 2]

A. Krishnaswami Aiyar and T. M. Ramaswamy Aiyar—for Appellants.

P. Narayanamoorthy and K. Kamanna—for Respondents.

Judgment.—This is a suit for partition. Plaintiff 1 is the father and plaintiff 2 is his natural born son. Defendant 1 is his adopted son and defendant 2 is the son of the adopted son. The question for consideration is, what is the share to which defendant 1, the adopted son, is entitled when a suit is brought for partition and the father is a party to that suit. A question was raised which is referred to in the written statement that, as before the birth of a second son, there was an award of arbitrators settling the disputes between plaintiff 1 and defendant 1, a decree should be passed in pursuance of that award. Issue 1 related to that contention. The facts relating to that issue are these: The adoption of defendant 1 was made in 1887 when plaintiff 1's first wife was alive. She died in 1888. Plaintiff 1 contemplated marrying a second wife. Thereupon the natural father of defendant 1

raised disputes and asked that before the second marriage was performed, the share of defendant 1 should be set apart. It is said that, in consequence of this objection by the natural father of defendant 1, the arbitrators settled the shares of plaintiff 1 and defendant 1. The District Munsif was of opinion that, as the award was not made a decree of Court and as it was not registered, it was not receivable in evidence; but he gave to the two plaintiffs and defendant 1 a third share each in the property. He relied upon the decision in *Raja v. Subbaraya* (1), which has since been overruled by *Karuturi Gopalan v. Karuturi Venkata Raghavulu* (2). The Munsif also stated in his judgment that the genuineness of the award was not admitted by the plaintiffs. Against the decree of the Munsif there was an appeal to the Subordinate Judge. A memorandum of objections was also filed by the defendants.

In that memorandum there is no claim that they should be given a half-share under the award. The Subordinate Judge came to the conclusion that the share to which defendant 1 was entitled was 1/9th of the property. Against this finding this second appeal has been preferred by the defendants. Mr. Krishnaswami Aiyer argued that the conclusion come to by the lower Courts that the award is not receivable in evidence was wrong and that his clients were entitled to a finding whether the award was genuine or not and to a decree in pursuance of that award. He considered that the appellants could not claim one-half of that property as there was no memorandum of objections in the lower appellate Court, but argued that he is entitled to rely upon the award for the purpose of securing the decree of the District Munsif. We have come to the conclusion that it is not open to the appellants to rely upon that award. The genuineness was disputed. There was no attempt made in the lower appellate Court to base any claim upon the award. We have no affidavit before us by the appellants or by their pleader that this question was argued in the lower appellate Court. Under the circumstances we are of opinion that the defendants gave up their right under issue 1. As was held by the Judicial Committee in *Venkata Narasimha Naidu*

v. Bhasyakarlu Naidu (3), on a question of disputed facts it is within the competence of the pleader or parties to give up an issue; that is what seems to have happened in the lower Court. We are not prepared to remit the issue for a finding as to whether this award was genuine or not.

Now we come to the main question in the case and that is, what is the share to which defendant 1 is entitled where a suit is brought during the lifetime of his adoptive father for settling the shares. There can be no doubt that if Manu's Text in Ch. 9, sloka 163, is to be applied literally, defendant 1 will be entitled to nothing more than maintenance. But Vignaneswara, in commenting upon Yagnavalkya's text, points out that this rule must be restricted to cases where the adopted son is not a good man. Since that time three Smrithi writers at least have laid down the rules as regards the shares of the adopted son: Vasista, Katya-yana and Budhayana. All of them say that the adopted son, if a son is born to the adoptive father after the adoption, is entitled to 1/4th share. In this Court it has been consistently held that the meaning of that text is that the property should be divided into five shares, four of which will be taken by the natural son and one will be taken by the adopted son.

The contention of Mr. Krishnaswami Iyer was that this rule, being a restriction upon the natural rights of a son, should be confined to cases where there is a partition between the brothers—between the adopted son and the natural born son, and should not be applied to cases where a suit is brought by the father to divide the property. He relied for this contention upon the latest pronouncement of the Judicial Committee in *Pratapsing Shivsing v. Agarsinghji Raisinghji* (4), where their Lordships point out that the adopted son, ordinarily speaking, is in the same position as a natural born son. That observation was made regarding the right of maintenance; it was held that the fact that a person is adopted will not deprive him of the right. The learned vakil also relied upon two other cases. *Nagindas Bhugwandas v. Bachoo Hur-*

(1) [1884] 7 Mad. 253.

(2) [1917] 40 Mad. 632=31 I. C. 574.

(3) [1902] 25 Mad. 367=29 I. A. 76=8 Sar. 258 (P. C.).

(4) A. I. R. 1918 P. C. 192=42 Bom. 778=46 I. A. 97=50 I. C. 457 (P. C.).

kissondas (5), was a case where the question was what was the share to which the adopted son was entitled to in cases of collateral succession. The adopted son and the natural born son were the only two heirs who were alive when the succession opened, and it was held that the text of Vasistha was not applicable to such a case and that both the sons were entitled to the inheritance in equal moieties. In *Gangadhar v. Hira Lal* (6) which related to the stridhanam of a step-mother, both Woodroffe and Mukerjee, JJ., point out that the exception should be confined within proper limits and should not be extended to cases of stridhana succession. From these observations Mr. Krishnaswami Iyer contended that the injunction of Vasistha should be confined to cases where the suit is brought by a natural born son against the adopted son or vice versa and should not be extended to cases where the suit is instituted in the lifetime of the father. On principle there is no reason why such a limited application should be given to the text of Vasistha or Bodhayana or Katyayana.

In two cases of this Court the matter seems to have been taken for granted that even if such a suit is brought during the lifetime of the father, the text of Vasistha will be applicable: *Narasimhappa v. Chinna Kenchappa* (7) and Appeal No. 104 of 1914. But in those cases there was no discussion upon this point. And naturally the learned vakil for the appellants contended that the decision is not binding upon him. We have therefore considered the text of the Hindu law with some care and we are glad to say that our conclusion is in accordance with the decision come to in the two cases already cited.

As was pointed out by Mr. Narayana-murthi for the respondents, in this portion of Mitakshara in S. 1, the whole discussion begins with a definition of Daya. The author says that properties are of two kinds: obstructed property and unobstructed property. First of all he deals with the unobstructed property and then deals with obstructed property. The rules relating to partition are all contained in the sections dealing with unobstructed

property. Here again, we must observe that the sections are not to be found in Vignaneswara's commentary, but they were imported by Mr. Colebrooke who has very carefully analyzed the commentary and has given headings which he thought were appropriate for the subject matter discussed. In Cl. 1, S. 2 the rules relating to partition during the lifetime of the father are considered. In S. 3 the rules relating to partition after the death of the father are considered and the other Ss. 4, 5, 6, 7, 8, 9 and 10 deal with matters which would be applicable to both classes of partition—partition during the lifetime of the father and partition after his death. S. 11, in which the question as to the right of the adopted son when he is in competition with a natural born son is dealt with, must also be regarded as belonging to the same category as Ss. 4 to 10, which have all a general application without reference either to the question of partition after the death of the father or partition before his death. There is no reason for saying that the text applies only to cases of partition after the death of the father. No doubt the language in Sanskrit, to which Mr. Ramaswami Iyer drew our attention in reply, suggests that the commentator contemplated a state of things existing after the death of the father. But that would not show that this text is solely to be applied to cases where partition takes place after the death of the father and not during his lifetime. After dealing with this portion of Yagnavalkya's Text Vignaneswara begins the next head of discussion, viz., obstructed properties. What has been laid down in the two cases decided by the Judicial Committee and by the Calcutta High Court relates to the second head of discussion, obstructed property.

It was held in these cases that there is no reason for applying S. 11 to subjects covered by Ch. 2. In our opinion we will be doing no violence to the canon of interpretation suggested by the Judicial Committee and by the learned Judges of the Calcutta High Court by applying the rule in S. 11 to cases of partition during the lifetime of the father, because S. 11 is germane to the discussion relating to unobstructed property. In the *Dattaka Chandrika*, the *Dattaka Mimamsa* and the *Saraswathi Vilasa*, the rule of Vasistha is quoted as of general application to all

(5) A. I. R. 1915 P. C. 41=40 Bom. 270=43 I. A. 56=32 I. C. 403 (P. C.).

(6) [1916] 43 Cal. 914=34 I. C. 10.

(7) [1917] 38 I. C. 244.

cases of partition. The principle underlying the texts is that in the partition of the patrimony inter se between the members of the family the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. According to Bodhayana Sutram the adopted child has to give and provide at the time of adoption that he would not claim more than a fourth share of his father's property if a natural son is born. For these reasons we are of opinion that the lower Courts were right in holding that Vasistha's text is applicable to the present case. Applying that rule, the father and the natural son would between them be entitled to eight shares and the adopted son to one share in the property.

We dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

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BAKEWELL AND MOORE, JJ.

Ramanathan Pillai—Plaintiff—Appellant.

v.

M. Doraiswami Ayyangar and others—Defendants—Respondents.

Second Appeal No. 1061 of 1918, Decided on 2nd September 1919, against decree of Dist. Judge, Madura, in Appeal Suit No. 121 of 1917.

(a) Civil P. C. (1908), Ss. 47 and 145 — Scope—Surety is not party to suit under S. 47, but S. 145 makes him a party for purpose of appeal—Surety is not party to execution proceedings until application for order against him is made.

The effect of S. 145, Civil P. C., is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within the meaning of S. 47 of the Code and S. 145 only makes him a party for a limited purpose, namely for appeal.

[P 77 C 1]

(b) Civil P. C. (1908), Ss. 47 and 145 — Surety must file separate suit for cancellation of bond on ground of fraud and cannot proceed under S. 47.

A surety therefore who wishes to get the surety bond cancelled on the ground of fraud should proceed by way of a regular suit, and not by an application under S. 47, Civil P. C.: 36 Bom. 42; 39 All. 225 and 41 Mad. 327, Dist. [P 77 C 1]

B. Sitarama Rao and S. R. Muthuswamy Aiyar—for Appellant.

A. Narasimhachariar for V. V. Srinivasa Aiyangar—for Respondents.

Judgment.—In execution of the decree in Civil Suit No. 34 of 1912 in the High Court, one Sayyed Mahomed Rowther was arrested. On 29th September 1914 the judgment-debtor and the present appellant as surety on behalf of the judgment-debtor executed a security bond for Rs. 4,443-2-0 in favour of the District Court of Ramnad in which Court the execution proceedings were pending, and the judgment-debtor was released. The bond provides for the payment of the amount either jointly or severally by the executants. There is also a further provision that, in case of default in payment, the money should be recovered from the surety personally, and from the properties hypothecated under the security bond and from the other properties of the surety.

The properties hypothecated are, it appears, situate in the Madura District. On 8th February 1915 the appellant filed a suit (Original Suit No. 19 of 1915) in the Subordinate Judge's Court of Madura against the plaintiffs in Civil Suit No. 34 of 1912 and their judgment-debtor, for a declaration that the security bond had been fraudulently obtained by the defendants and was void and not binding on the appellant's properties and for cancellation of the security bond. It was alleged in the plaint that the appellant was a person of weak intellect and that the bond had been executed owing to undue influence, fraud and coercion practised upon him by certain persons acting in collusion with the defendants. A preliminary objection was taken by defendants-respondents that the suit was barred by S. 47, Civil P. C. The Temporary Subordinate Judge held that the appellant had alternative remedies: (1) in execution proceedings in the Ramnad District Court and (2) by way of suit. He further decided that, as the appellant had a remedy in execution proceedings, the Court should not in the exercise of its discretion grant the declaratory relief sought for and in the result, dismissed the suit. In appeal the District Judge took the same view and held "that as the party had a remedy in execution and also an appeal," the declaratory relief asked for was rightly refused.

Mr. Sitarama Rao for the appellant contended: (1) that the lower appellate Court ought to have held that no relief such as is claimed in the plaint could be granted in execution, (2) that the suit being for the substantial relief of cancellation of the document on the ground of undue influence and fraud which the executing Court could not grant, the lower appellate Court erred in holding that it had a discretion in relief, and that, in any view of the case, the discretion had been improperly and illegally exercised.

The question raised in this appeal, viz., whether a third party who has given security on behalf of a judgment-debtor for the due performance of a decree has an independent right of application under S. 47, Civil P. C., and can apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud, or whether his only remedy is by way of suit, is a novel one and not free from difficulty. No decision directly bearing on the question has been cited before us. S. 145, Civil P. C., which corresponds to S. 253 of the Code of 1882, is in these terms:

"Where any person has become liable as surety (a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree, or (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal be deemed a party within the meaning of S. 47: Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

The section provides a summary remedy in execution and dispenses with the necessity for a separate suit to the extent to which the surety has rendered himself personally liable. *Motilal v. Chandrasangji* (1) and *Amir v. Mahadeo Prasad* (2), which were relied on by the learned vakil for the appellant, have no direct bearing on the question which we have to decide. In *Motilal's* case (1) it was held that where a bond is passed by third parties as security for restitution in the event of the decree being reversed in appeal, the obligee may file a suit upon the contract contained in the bond. In *Amir v. Mahadeo Prasad* (2) the learned

Judges held that, if the surety takes upon himself more than the personal liability and hypothecates immovable property, such hypothecation can only be enforced against the property by means of a regular suit.

The learned vakil for the respondents has referred us to the decision in *Subramania Chettiar v. Rajeshwara Sethupati* (3). In that case the question was whether, when immovable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under O. 41, R. 5 (3), Civil P. C., that property can be realized by a decree-holder in execution or can only be realized by a separate suit. The learned Judges (Wallis, C. J. and Kumaraswami Sastri, J.), were of opinion that the matter being one relating to execution under S. 47, Civil P. C., a separate suit did not lie, and that the fact that the bond was given to the Court did not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. At p. 333 (of 41 *Mad.*) of the report the learned Chief Justice observed that it was unnecessary to deal with cases of security given by third parties under S. 145, Civil P. C.

The point for decision in this appeal is whether the surety can be regarded as a party to the suit, so as to entitle him to present an application to the Court executing the decree. In *Linga Reddi v. Hussain Reddy* (4) it was held, on the authority of *Thirumalai v. Ramayyar* (5), *Shek Suleman v. Shivram* (6) and other cases with reference to S. 253 of the Code of 1882 that the surety should be treated as a party to the suit and cannot bring a suit for a declaration that he is not liable under the surety bond. S. 145, Civil P. C., differs in some respects from the old section. S. 145 says that the surety

"shall for the purpose of appeal be deemed to be a party within the meaning of S. 47."

We think that the words "shall for the purpose of appeal be deemed to be a party,"

which were apparently introduced in order to give effect to certain rulings under the old Code *Akhoot Ramanah v. Ahmed Eusoofjee* (7) only mean that if an

(1) [1912] 36 Bom. 42=12 I. C. 549.

(2) [1917] 39 All. 225=38 I. C. 33.

(3) [1918] 41 Mad. 327=43 I. C. 187.

(4) [1905] 28 Mad. 117=14 M.L.J. 430.

(5) [1890] 13 Mad. 1.

(6) [1888] 12 Bom. 71.

(7) [1871] 15 W.R. 538=7 B.L.R. 81.

order is made in execution against a surety, the surety may appeal against the order as if he were a party to the suit in which the decree or order sought to be executed was passed and that the reference to S. 47 does not in other respects import into S. 145 the provision contained in S. 47 which bars a separate suit. If it were not for the provisions of S. 145, the liability of the surety would have to be enforced by a separate suit, because it does not arise under the decree but subsequently and under a separate contract with the Court. The effect of the section is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within S. 47 and S. 145 only makes him a party for a limited purpose namely for appeal.

It is doubtful whether the question in this case relates to the execution, discharge or satisfaction of the decree, since it relates to the surety bond and not to the decree and to the enforcement of the liability incurred thereunder and not under the decree. We doubt whether the surety, if he be not made a party to execution proceedings, can intervene in a matter in which he has no interest.

We are unable therefore to agree with the conclusion arrived at by the lower Courts that the surety has a right to apply under S. 47 to have the security bond cancelled.

The lower Courts have refused the declaratory relief sought for, on the ground that it was a discretionary relief and as the appellant had a separate remedy by way of suit. We think that the lower Courts were wrong, and that the suit should have been tried on the merits. We accordingly allow the appeal with costs in this Court and reverse the decrees of the lower Courts. The Temporary Subordinate Judge is directed to restore the suit to his file and dispose of it according to law. Costs in the lower Courts will abide the result. The appellant is entitled to a refund of the court-fee of the second appeal.

V.S./R.K.

Appeal allowed.

A. I. R. 1920 Madras 77

SADASIVA AIYAR AND BURN, JJ.

Venganat Raja Vasudeva—Defendant—Appellant.

v.

Naithilath Matathil Ramankutty Menon and others—Plaintiffs—Respondents.

Civil Appeal No. 173 of 1918, Decided on 28th August 1919, against decree of Sub-Judge, South Malabar, in Original Suit No. 39 of 1916.

(a) **Malabar Law—Karnavan—Agreement by for benefit of tarwad is not invalidated on ground that junior member was not consulted.**

Where an agreement is entered into by the karnavan of a Malabar tarwad for the benefit of the tarwad, the fact that a junior member was not consulted about it is not legal ground for invalidating the agreement. [P 79 C 1]

(b) **Civil P. C. (1908), S. 11—Finding of lower appellate Court does not operate as res judicata when second appeal is preferred and decided on separate grounds or even under compromise.**

When an appeal is filed and admitted, the matters decided by the lower Court cease to be res judicata and are left open between the parties for argument before, and decision by, the appellate Court. If the appellate Court disposes of the appeal on points independently of those on which the lower Court rested its decision or in terms of a compromise between the parties, the findings of the lower Court do not operate as res judicata in regard to the matters dealt with by it. [P 80 C 2]

C. V. Ananthakrishna Aiyar and *P. S. Kalyanasundara Aiyar*—for Appellant.

C. Madhavan Nair, P. Appa Nair and *S. Eacharan Kutti Nair*—for Respondents.

Sadasiva Aiyar, J.—Defendant 1, the Valia Nambidi of Kollengode, is the appellant before us.

The suit was brought by the last surviving member of a Nair tarwad for an injunction against defendant 1's (nambidi's) exercising the irrigation rights secured to him under the registered compromise deed Ex. 14 (dated 6th July 1904), signed by the plaintiff's deceased elder brother (the then karnavan of the plaintiff's tarwad), by defendant 1 and by the members of defendant 2's family (who might be called shortly "the pandarams") and intended to define clearly and "for ever" by agreement the respective rights of the three families to the use of the water flowing in certain channels taking off from the Meenkara river by the help of an anicut called the Kotta Katavu anicut constructed by the plaintiff's tarwad.

The disputed agreement, Ex. 14, dated 6th July 1904, between the above interested three families was entered into in supersession of the prior agreement Ex. A, dated 9th March 1897, executed between two only of the three parties, namely the plaintiff's tarwad and the pandarams.

The plaintiff's case is (see paras. 5, 8, and 9 of the plaint):

(a) That defendant 1 cunningly gained over late Gopal Menon" (the plaintiff's elder brother and then tarwad karnavan) "and through him" the pandarams, that "defendant 1 made Gopal Menon to believe that he" (defendant 1), "would cause one of his younger brothers to marry one of his (Gopal Menon's) daughters and (thus) got the karar."

(Ex. 14) "executed" without necessity "fraudulently" and that defendant 1's younger brother afterwards married a daughter of Gopal Menon.

(b) That the said Karar was highly detrimental to the plaintiff and to his Pallam Nilam and Netuvanchira Nilam "and great trouble, loss and ruin are likely to happen to many of the holders of the anicut lower down thereby,"

and it opposed,

"to the stipulations made in respect of the anicut and channel by the Government and the plaintiff's karnavan Gopal Menon."

The pandaram defendants (2 to 7) remained ex parte. The principal pandaram defendant (defendant 2) gave evidence in support of the karar, Ex. 14, which is attacked by the plaintiff. The contest is thus between the plaintiff and defendant 1 whose families are (according to para. 11 of the plaint) "ancient enemies." One further allegation of the plaintiff is that he knew of his karnavan's fraudulent and collusive action only after January 1914, when defendant 1 for the first time (according to the plaintiff) attempted to enforce his rights of irrigation under Ex. 14 though the karar had been executed in July 1904.

The issues raised by the lower Court on defendant 1's contentions are (among others) the following:

"2 Is the karar referred to in paras. 7 and 8 of the plaint invalid as alleged by the plaintiff."

"7 Whether the dispute as to the chal and anicut referred to in the plaint has not been finally settled by the decision in Original Suit No. 50 of 1900 and Appeal Suit No. 59 of 1902 (High Court), and is not defendant 1's claim barred by res judicata by reason of the said decision."

I propose to deal only with these two issues because if they are decided against

the plaintiff his suit fails. I think that the lower Court would have done well to have raised (having reference to the allegations of the parties) three clear and distinct issues on the points involved in issue 2. I shall accordingly expand the issue thus:

(2a). Did defendant 1, by promising to make one of his brothers marry Gopal Menon's daughter, induce him to enter into the agreement Ex. 14; and did Gopal Menon enter into the agreement with that ulterior object and not in the interest of the tarwad as a karnavan should have done?

(2b) Is that agreement detrimental to the interest of the plaintiff's tarwad by reason of its causing injury to the irrigation of the plaintiff's tarwad lands, whereas the old agreement Ex. A (between the plaintiff's tarwad and the pandarams), which it superseded, did not cause any such detriment?

(2c). Is that agreement detrimental to the plaintiff's tarwad as interfering with his obligations to the Government and to the owners of lands lower down the anicut, and is it therefore not binding on the plaintiff's tarwad?

The learned Subordinate Judge dealt with issues 2 and 3 together in paras. 6 and 7 of his judgment. So far as issue 2 is concerned, he does not come to close quarters with the grounds put forward by the plaintiff as his grounds of attack against the karar. The Subordinate Judge's conclusions on the facts are: (a) Ex. 14 was entered into by Gopal Menon (the plaintiff's karnavan) without the knowledge and consent of the plaintiff, a junior member then, (b) the karar Ex. 14 "is prima facie injurious to the interests of plaintiff's tarwad as it brings in a new joint owner or beneficiary of the anicut and channel" (that is a new beneficiary in addition to the plaintiff's tarwad and the pandarams who were the beneficiaries under Ex. A of 1897.

I feel constrained to remark that this is an unsatisfactory way of disposing of the issue, which is whether the karar Ex. 14 is invalid "as alleged by the plaintiff," that is on the ground that it would cause "great hardship" by cutting off irrigation water which the plaintiff's tarwad lands were getting under the old karar and that it would put to "trouble and loss the plaintiff, the ancient enemy" of defendant 1's family, and that

"incalculable and inestimable loss and trouble and mental pain are likely to befall the plaintiff every year."

(see plaint paras. 11 and 12) and on the ground of fraud, collusion and danger of subjection to legal liability to Government and to the lower riparian owners. The casual observance of the Sub-

ordinate Judge that the karar is prima facie detrimental" because it introduces a third beneficiary is not convincing as unless the introduction of the third beneficiary lessened the benefit till then enjoyed by the plaintiff's tarwad under the old agreement, the mere introduction of a new beneficiary cannot be detrimental. The plaintiff not having been consulted is not a legal ground invalidating the agreement to which his karnavan was a party.

The Subordinate Judge should have considered the respective terms of Exs. A and 14 as they affected the plaintiff's tarwad, should have considered the evidence let in on both sides about the alleged fraud and collusion, and then decided the three questions (a), (b) and (c) and finally arrived at his conclusions on issue 2.

However, as this is a regular appeal in which we are entitled ourselves to arrive at the necessary finding on the facts, I shall proceed to the consideration of the evidence.

Before dealing with the oral evidence a few facts as to the litigation, in the course of which the compromise Ex. 14 was entered into, might be mentioned. That litigation began by the suit (Original Suit No. 454 of 1902) brought by the Nambidi as plaintiff against Gopala Menon (the karnavan of the present plaintiff's tarwad) as defendant 1 and against the Secretary of State for India as defendant 2 for two principal reliefs,

"to direct defendants 1 and 2 to surrender the road site described in the plaint schedule to the plaintiff, after causing the channel which defendant 1 newly opened through it to be filled up and after converting the said plot into road site and if the channel is not filled up, to direct defendant 1 to pay to the plaintiff Rs. 50 for the expenses that would be required for the filling up of the said channel; (b) to restrain the defendants by a perpetual injunction from opening a channel along the said road site and from carrying water through it in case it is found that the said road site has not been given up by the Government."

The channel referred to above is the channel which was irrigating about 2,000 paras of Gopal Menon's (and the present plaintiff's) tarwad lands, D in the Commissioner's plan Ex. 12 (I refer to that plan as proved to be correct in preference to the plaintiff's plan B). It is clear that if the Nambidi (the present defendant 1) had succeeded in that suit brought by him, the plaintiff's tarwad "would have been

injured considerably" as admitted in plaintiff's own evidence in this suit see p. 159 of the printed records, lines 42 to 44.

I shall further set out (a) the rights of irrigation of the plaintiff's tarwad and the pandarams' family under Ex. A and (b) of the plaintiff's tarwad the nambidi's kovilagam and the pandaram's family under Ex. 14. Under Ex. A of 1897, (1) plaintiff's tarwad got the right to take water during 111 days out of the nine months (or 273 days) in the year during which water was available (the remaining three months from the middle of March to the middle of June or about 92 days in the year being considered useless for irrigation purposes); (2) the pandarams' family had the murai during the remaining 162 days. (I have taken 273 days as equivalent to the nine months though the parties might have roughly considered that each month contained 30 days).

Under Ex. 14 of 1904: 1. Plaintiff's tarwad got about 165 days instead of 111 days in Ex. A (out of the 273 days; (2) the pandarams' family got 54 days murai (they having had 162 days' murai under Ex. A); and (3) the nambidi's tarwad got the remaining 54 days' murai newly.

It will thus be seen that the plaintiff's tarwad got under Ex. 14 irrigation facilities for 54 days (165 minus 111, more than they had under Ex. A and as it is conceded that the particular days in the Malabar months during which irrigation is allowed do not matter, Ex. 14 is much more advantageous to the plaintiff's tarwad than Ex. A, it is the Pandarams that lost under Ex. 14, but the pandarams not only do not complain but (as I said before) defendant 2 gave evidence in this suit as defendants' witness 3 in favour of the nambidi. How then could Ex. 14, which was executed in compromise of the suit of 1902, be detrimental to the interests of the plaintiff's tarwad?

Only two witnesses were examined for the plaintiff. Witness 1 is the interested plaintiff himself and he is wholly unable to state how an agreement which is more favourable to his tarwad than the former agreement is really detrimental to his tarwad. The gist of his evidence is that because it favours his enemy, the nambidi, it is detrimental to himself. Witness 2 is a dependant and creature of the

plaintiff and he gives no evidence about the alleged injury caused by the new karar. He says:

"I depend upon the plaintiff for my subsistence."

Even his kudiyruppu belongs to the plaintiff. As to the alleged promise made by defendant 1 to Gopal Menon to make one of defendant 1's brothers to marry Gopal Menon's daughter, the only evidence is that of the plaintiff. He first said that defendant 1's brother, Madhava Rajah, was to marry Gopala Menon's daughter, but he was obliged to admit that Madhava Rajah's marriage had taken place in 1901 about three years before the date of this karar. No doubt one of the defendant's brothers married Gopal Menon's daughter after date of Ex. 14, but this was five years after the date of Ex. 14. There is absolutely nothing to connect that marriage with Ex. 14, except the plaintiff's evidence which is practically vague hearsay evidence.

As regards the contention that the agreement interferes with the plaintiff's obligations to Government and to the owners of lands lower down the anicut this has been sufficiently dealt with in the judgment of my learned brother with which I entirely agree.

The Subordinate Judge has found the agreement to be invalid on the ground that defendant 1 is legally precluded from relying on the karar by reason of the res judicata created by the decision of the High Court in appeal Suit No. 59 of 1903 (issue 7).

The facts connected with that litigation have been set out in the judgment of my learned brother. The Court of first instance dismissed the nambidi's Suit No. 50 of 1900 on three grounds: that the site of the channel then in dispute belonged to the Collector and that the channel belonged to Gopal Menon's tarwad; (2) that the nambidi's suit for injunction was bad for nonjoinder of the Secretary of State as a party; and (3) that the relief of injunction is a matter of discretion in the Court; and in the circumstances of that case the injunction relief could not be granted especially as in the absence of the Government as a party, such relief would be futile. When the case went up on appeal to the High Court this Court was not called upon to decide it either on the questions of law or on the questions of fact argued in the first Court.

None of the three grounds on which the lower Court decided that the suit, so far as it related to the injunction relief in respect of the anicut and chal site should be dismissed was considered by this Court and no opinion was arrived at on the question whether the lower Court's view on any of the three points was right or wrong. (That suit itself was substantially and mainly for the redemption of some mortgaged lands on payment of the mortgage amount and of the value of the improvements.) It is an elementary principle of law that when an appeal is filed and admitted the matters decided by the lower Court cease to be res judicata and are left open between the parties for argument before, and decision by, the appellate Court.

No questions were decided in the appellate Court in the suit of 1900 owing to the parties agreeing that that portion of the decree of the lower Court which refused the injunction reliefs relating to the chal and anicut site, should stand, the remaining portion of the decree relating to redemption being modified in favour of the Nambidi (appellant) on the question of the value of improvements. Under those circumstances, it is futile to contend that any finding as to the rights of the Nambidi and Gopal Menon in the sites of or the waters tapped by the chal and the anicut was arrived at by the High Court on appeal. The argument based on the imaginary existence of that implied finding by the High Court, a finding which if it existed is no doubt later in date than Ex. 14 of 1904 (the High Court compromise decree being dated January 1905), the argument being that that implied finding declared rights which superseded the rights created by Ex. 14, therefore falls. No finding negating the rights as declared and agreed upon in Ex. 14 was necessarily implied in the High Court's decree, as no such finding was necessary for the disallowance by consent of parties or even otherwise of the plaintiff's prayer for injunction in that suit in respect of the anicut and chal site.

In the result, the appeal must be allowed with the appellant's costs in both the Courts payable by the plaintiff.

Burn, J.—The plaintiff, who is the last surviving member of a Malabar tarwad, brought this suit for an injunction and to restrain defendant 1, and his

of the awards, but in terms of the compromise which modified the awards. According to the compromise decree, Puran Singh gave up his full proprietary ownership of the property which had been allotted to him, and reserved to himself only a life interest in that property. It seems to me that Puran Singh then, after the award, as full and sole owner of his specifically allotted property was perfectly justified in doing what he liked with it. He could, if he so wished, have made a gift of this chaupal or of any other parcel of his (now own) property to whomsoever he pleased. If he had made a gift of this chaupal, for instance, to one or both of his sons, it could not be argued that such a gift was illegal in itself. Instead however of making an absolute gift of the chaupal he gave it subject to his own life interest, in other words, the sons became owners of it subject to the father's right to enjoy its usufruct so long as he lived. Whether this transaction was done out of Court, by private treaty, or during the pendency of litigation and was finally incorporated in a Court decree, seems to me wholly immaterial. It must of course be understood that the transfer made by Puran Singh was not vitiated by fraud or made to defeat creditors. No such considerations arise in this case, although it is true that in the course of his judgment the learned Munsif observed that

"the condition in the compromise derogating Puran Singh's absolute ownership in the property under the arbitration award was not a bona fide one but was evidently intended to defeat Puran Singh's creditors. Such condition in restraint is, in my opinion, void and ineffectual as against the contending defendants who were no parties to the case."

This seems to me to be an inference drawn from what the learned Munsif considered the probabilities of the case, rather than a decision or finding on which he based his conclusion. This must be so because there was no proper foundation laid in the pleadings on which such a defence could be raised, and I find on examining the record no evidence at all on which it could be decided. It was not the ground of decision in either of the Courts below. The lower appellate Court held simply that

"the condition imposed in the compromise embodied in the decree that Puran Singh will have no power to transfer his separated property was void as being a restraint upon alienation,

vide S. 10, Act 4 of 1882 and *Khiali Ram v. Raghunath Prasad* (1)."

In my opinion the Court has completely misconstrued and misunderstood the compromise decree. So far from being a transfer from the sons to their father with restrictions on his powers of alienation, the father transferred to his sons (subject to his life enjoyment of the usufruct) with no restrictions on their rights of alienation in the property so transferred. Hence S. 10, has no application. It would have been otherwise had Puran Singh conveyed to his sons his whole proprietary rights in the property and then sought by a condition in the compromise to prevent them alienating the property.

On the facts I would hold that all that Puran Singh was entitled to was a life interest in the property and that that was all that the creditor could attach and bring to sale in execution of his decree.

Walsh, J. — I agree. The point referred really does not arise. Out of deference to the referring order of our brother Lindsay, I will merely say that I agree with the view which he evidently took. I do not think the Transfer of Property Act applies to partitions of joint Hindu family property, nor do I think that a limited interest partitioned to one member of such a family is aimed at by S. 10. In my opinion the Transfer of Property Act deals with the formal acts and documents brought into existence by parties with the object of effecting transfers and not with mere transactions which, although not in form transfers, may produce similar results. The view of our brother Lindsay seems to me to follow from the reasoning in *Gyannessu v. Mobarkanessa* (2), but it is not necessary for us to decide this point.

By the Court.—The result is that the relief to which the plaintiff is entitled is a declaration that Puran Singh has vested in him a life-interest in the property in suit, and that no more than such life-interest or usufruct can be sold. The plaintiff however claimed a good deal more than this by his plaint. It is only in consequence of the Courts having gone too far in the opposite direction that it was necessary for him to come here. Under the circumstances the appeal will be allowed and the plaintiff granted a decree for a declaration in the limited

(1) [1906] 3 A.L.J. 621=(1906) A. W. N. 214.

(2) [1898] 25 Cal. 210=2 C. W. N. 91.

sense above mentioned, but the parties must pay their own costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1919 Allahabad 82 (1)

KNOX, J.

Jawad Husain and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Misc. No. 242 of 1919, Decided on 18th December 1919.

Criminal P. C. (5 of 1898), S. 497—If *prima facie* case appears to be made out bail in non-bailable offence should be refused but not otherwise.

In considering an application for bail from a person accused of a non-bailable offence, the Court must be satisfied by an examination of the investigation inquiry or trial, whether or not there are reasonable grounds for believing that the accused has committed such offence. In the latter case the accused should be admitted to bail, but not in the former. [P 82 C 1]

S. C. Mukerji—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is an application for admission to bail. The applicants are under trial for an offence under S. 408, I. P. C. On turning to Sch. 2 attached to the Code of Criminal Procedure, it will be found that offences under S. 408 are not bailable offences. The Magistrate in charge of the case has refused bail. A case of this nature has to be dealt with under S. 497, Criminal P. C. Para. 2 of that section lays down that if it appears to a Court at any stage of the investigation inquiry or trial that there are not reasonable grounds for believing that the accused has committed such offence but that there are sufficient grounds for further inquiry into his guilt, the accused shall pending such inquiry be released on bail. From this it seems that the law requires that the investigation inquiry or trial which is proceeding should be examined and that before admitting to bail this Court should come to the conclusion that there are not reasonable grounds for believing that the accused has committed such offence. Further that the person accused of such an offence is not to be released if there appears reasonable grounds for believing that the accused has been guilty of the offence charged. The affidavit before me which supports the application for bail contains absolutely no reason whatever why the accused should be admitted to bail. It does not help me in coming to any conclusion whether the accused have or have not been guilty of a

non-bailable offence. In the arguments addressed to me all that I have heard is that a case was instituted in the Court below charging these same accused with an offence under S. 420, I. P. C. The matter was considered and the applicants admitted to bail. It is stated that the offence under S. 408 hardly differs from that under S. 420. I am unable to follow this inference. I see no reason to interfere and dismiss the application. The applicants must surrender to their bail and undergo the remainder of their sentences.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 82 (2)

BANERJI AND PIGGOTT, JJ.

Nand Kishore—Plaintiff—Appellant.

v.

Abdul Rahman—Defendant—Respondent.

First Appeal No. 69 of 1919, Decided on 31st July 1919, from order of Sub. Judge, Moradabad, D/- 1st February 1919.

(a) Civil P. C. (5 of 1908), O. 7, R. 10—Order returning plaint for proper presentation is appealable.

An order passed by an appellate Court directing the plaint filed in the case to be returned for presentation to the proper Court is appealable to the High Court. [P 83 C 1]

(b) Civil P. C. (5 of 1908), S. 21—Objection to place of suing should not be allowed in appeal unless failure of justice is caused.

An appellate Court before allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice consequent on the suit having been instituted in the wrong Court. [P 83 C 1]

Nehal Chand—for Appellant.

S. Raza Ali—for Respondent.

Judgment.—This is an appeal from an order passed by the Subordinate Judge of Moradabad in an appeal directing the plaint filed in the case to be returned to the plaintiff for presentation in the proper Court. The suit was brought in the Court of the City Munsif of Moradabad. One of the pleas taken in defence was that the suit was not cognizable by that Court but should have been brought in the Court of the Munsif of Sambhal. The learned City Munsif set down the suit for hearing, framed proper issues, held that the cause of action had arisen within his jurisdiction and gave the plaintiff a decree. On appeal the learned Subordinate Judge held that no part of the cause of action had arisen within the jurisdiction of the Court of the Munsif of Moradabad.

City. Without going further into the matter he passed the order now under appeal. That order no doubt, could be passed under the powers of an appellate Court as specified in S. 107, Civil P. C. and is also covered by the provisions of O. 41, R. 33 of the same Code. It is nevertheless an order returning a plaint to be presented to the proper Court, such as is referred to in O. 7, R. 10, Civil P. C. An objection has been taken in this Court to the effect that no appeal lies. On the wording of O. 43, R. 1 (a), we were disposed in any case to overrule this objection, but we find that the point is covered by clear authority. It was decided under the former Code of Civil Procedure in *Wahidullah v. Kanhaya Lal* (1) that an appeal lay from the order of an appellate Court directing a plaint to be returned. Subsequently in the case of *Dalip Singh v. Kundan Singh* (2) a Bench of this Court has held that the present Code of Civil Procedure makes no change in the law in this respect. We are therefore content to follow these authorities. Assuming that the appeal lies, it raises only one question, namely, whether the lower appellate Court has not overlooked the provisions of S. 21, Civil P. C. The case before us is in fact very similar in principle to that of *Dalip Singh v. Kundan Singh* (2), above referred to, except that in that case reference was made to the provisions of Cl. 2, S. 11, Suits Valuation Act 7 of 1887, whereas in the present case the question was one of territorial jurisdiction and reference is made to the closing part of S. 21, Civil P. C.

We think the appeal must succeed on this ground. The lower appellate Court, before allowing the objection as to the place of suing, should have considered whether there had been a failure of justice consequent on the suit having been instituted in the Court of the City Munsif of Moradabad instead of in the Court of the Munsif of Sambhal in the same district. This point has been altogether overlooked and we must therefore follow the precedent set in the case above referred to by setting aside the order under appeal and sending back the case to the lower appellate Court to be re-admitted under its original number in the file of pending appeals and disposed of on the

merits. We order accordingly. Costs of this appeal will abide the event of the suit.

V.B./R.K.

Appeal accepted.

A. I. R. 1919 Allahabad 83

RAFIQUE AND PIGGOTT, JJ.

Jai Narain—Defendant—Appellant.

v.

Bankey Lal and others—Plaintiffs—Respondents.

First Appeal No. 140 of 1916, Decided on 3rd April 1919, from decree of Dist. Judge, Mainpuri, D/- 2nd May 1916.

(a) **Mahomedan Law—Wakf—Validity—Will creating valid wakf is not bad for vagueness because all sorts of powers of management are given.**

Where by a Will wakf is created, the objects of the charity and the property in respect of which the wakf is created are specified and there is a direction as to the mode in which the wakf property is to be managed and applied, the will creates a trust which is not bad for vagueness, merely because the committee is given all sorts of powers regarding the management of the properties. [P 89 C 1]

(b) **Mahomedan Law—Wakf—Management—Will creating trust directing descendant to be member of managing committee—When no such person available Court can appoint strangers.**

Where in a will creating a trust and nominating a committee for the management thereof, the testator directs that no one other than a descendant of his is to be a member of the committee, and none of his descendants is available, or a sufficient number of them cannot be obtained to serve on the committee, the Court has power to add strangers to the committee. [P 89 C 2]

(c) **Civil P. C. (1908), S. 92—When new trustees are appointed direction to deliver property to them can be given.**

Where in a suit relating to a trust new trustees are appointed, the Court has power, under S. 92 (h), Civil P. C., to make a decree directing the old trustees to deliver the trust property to the new trustees. [P 89 C 2]

Motilal Nehru, Baldeo Ram Dave and Peary Lal Banerji—for Appellant.

Tej Bahadur Sapru, Surendro Nath Sen, Sital Prasad Ghosh, Girdharilal Agarwala, Uma Shanker Bajpai and Baleshwari Prasad—for Respondents.

Judgment.—The two appeals Nos. 140 and 241 of 1916, are connected and arise out of a suit brought under S. 92, Civil P. C.

The principal appeal is No. 140 of 1916 and is by one of the defendants only. It appears that there were two brothers, called Kunj Behari Lal and Sital Prasad who had a considerable joint business at Etawah. Kunj Behari had no children Sital Prasad had four sons, namely Banke

(1) [1903] 25 All. 174 (F. B.).

(2) A. I. R. 1914 All. 128=36 All. 58=22 I. C. 614.

Behari Lal, Girwardhari Lal, Banarsi Das and Sheo Narayan. On 6th December 1900 there was a partition between the two brothers Kunj Behari and Sital Prasad. On 21st December 1900 Kunj Behari made a will by which he gave his separated share to his nephew Banke Behari Lal, and the eldest son of the latter Jai Narayan, in the proportion of 7 annas and 9 annas respectively. Kunj Behari Lal died some time prior to 1902. On 18th December 1902, Sheo Narayan and Girwardhari Lal brought a suit against their father, and their brothers and nephews for partition of the property, ignoring the partition of 1900 and contesting at the same time the validity of the will of Kunj Behari Lal in favour of Banke Behari and his son. The dispute between the parties was referred to arbitration.

The arbitrators upheld the partition of 1900 as also the will of Kunj Behari Lal. They divided the separated share of Sital Prasad between him and his descendants. A decree was accordingly made in terms of the award on 16th April 1903, under which property of the value of about Rs. 52,000 was given to Sital Prasad. On 24th February 1904 Sital Prasad made a will in respect of his separated share, by which it is alleged he created a wakf directing the erection of a dharamshala and a bathing ghat at Etawah and appropriating the income to the upkeep of both. He died a few days after, on 5th March 1904. On 12th September 1904 two applications were made by Banke Behari Lal to the Municipal Board of Etawah for permission to build a bathing ghat on the banks of the Jamna and a dharamshala on the land mentioned in the application in or near the town of Etawah. The two applications are printed at pp. 16 and 17 (R). With regard to his application relating to the building of the bathing ghat permission was granted by the Municipality. His application about the dharamshala was refused on the ground that the land upon which he proposed to build was nazul land and permission could not be granted to build upon it. Nothing further was done in the matter for some years. Banke Behari Lal died on 5th March 1907. On 14th March 1907 Banarsi Das and Sheo Narayan, two of the sons of Sital Prasad, brought a suit against Jai Narayan, Girwardhari Lal and Gur Na-

rayan for cancellation of the will of 24th February 1904 and for the recovery of their share in the estate of Sital Prasad. In the alternative the plaintiffs prayed that if the Will of 24th February 1904 was held to be genuine, the directions contained therein should be carried out. The defence to the suit was that the will was a valid will and that it created a wakf. In May 1907, application was made by the plaintiffs for the amendment of their plaint, praying that the allegation with regard to the validity of the will be eliminated, and that their relief with regard to the maintenance and observance of the wakf be allowed. The amendment was opposed by the defendants unsuccessfully. The case was disposed of on 29th June 1907, and the only question before the Court was as to costs as the relief sought by the plaintiffs after the amendment was practically admitted by the defendants. A few days prior to the decision of that case Jai Narayan and Rup Narayan brought a suit on 13th June 1907 against Banarsi Das for the recovery of Rs 13,268 of which Rs. 11,934 was the principal and the balance interest, on the allegation that Banarsi Das had taken a loan from his father and the money was payable to the wakf fund. The claim was resisted on the ground that no loan was obtained by Banarsi Das, but that the sum in question was a gift by his father to him in his lifetime. The case was fixed for hearing on 5th December 1907. On that date the first meeting of the committee constituted by the will of 24th February 1904 was held and certain questions were put by Banarsi Das to the members of the committee for decision. Among the said questions three related to three sums alleged to have been paid to Banarsi Das, to the daughter of Jai Narayan and to the daughters-in-law of the family of Sital Prasad. The three sums were: Rs. 10,000 to Banarsi Das, Rs. 5,000 to the daughter of Banke Behari Lal as kannyadan, and Rs. 4,000 to the daughters-in-law of the family.

The committee came to the conclusion that the said three sums were gifts by Sital Prasad to the persons named above. Sheo Narayan, who was a member of the committee, entered his protest against the resolution of the committee. The proceedings of the committee of that date that have been printed and are before us

show that Sheo Narayan objected to one of the resolutions. He has however in his evidence deposed that he objected to all the resolutions passed at that meeting and that the word *yih* has been changed into *ek*, that is, in other words, the word "these" has been altered into "one."

Another resolution of the same committee was passed to the effect that the claim against Banarsi Das should not be pressed.

Accordingly a telegram was sent to the Court at Mainpuri where the case was pending and the claim against Banarsi Das was withdrawn.

On 27th May 1907 a house was purchased in Etawah for Rs. 8,500 and a dharamshala was started. It is in evidence that charity was dispensed at the place from 14th August 1907, to 3rd June 1909, and that the expenses during that period amounted to Rs. 1,308-8-3. The building was sold on 1st March 1910, and we will refer to this transaction later on. On 17th November 1913, an application was made by three persons, namely Gauri Shanker, Banke Lal and Ujagar Lal, to the Legal Remembrancer for permission to bring a suit in respect of the alleged wakf under S. 92, Civil P.C., and permission was granted to them on 19th March 1914. They instituted the suit out of which these two appeals have arisen on 20th May 1915 against the sons of Banke Behari Lal, of Girwardhari Lal, of Banarsi Das and against Sheo Narayan. The latter is the only surviving son of Sital Prasad. It was alleged in the plaint that Sital Prasad had created a wakf by his will dated 24th February 1904 and that the wakf property consisted of cash, houses, village and jewelry amounting in all to the value of Rupees 1,20,000. The trust was created according to the plaintiffs for the construction and upkeep of the dharamshala, the two temples and a bathing ghat on the banks of the Jamna, both for the use of the Hindu public. Under the will a committee was appointed, consisting of a President, a Secretary and four members. The committee had not only done nothing in the matter, but had been guilty of misconduct. It was alleged in para. 6 of the plaint that the members of the committee had been misappropriating the wakf property and had been deriving undue advantage therefrom and had been benefiting their near relations. A specific

instance of bad faith was given in para. 7 of the plaint, where it was stated that an irrecoverable debt due to the firm of Banke Behari Lal and Jai Narayan for the sum of Rs. 16,000 was transferred to the wakf account and a mortgage taken from the debtors. The plaintiffs described themselves as members of the family of Sital Prasad and of the religion that he belonged to. They said that they were entitled to worship at the temple that was to be built according to the will of 24th February 1904, as also to bathe at the ghat on the banks of the Jamna if that had been built. They therefore said that they had a right of action against the defendants. They distinctly stated that the wakf created under the will of 24th February 1904 was a charitable and religious public wakf. They prayed for the following reliefs:

(a) The present trustees may be removed and new ones may be appointed according to the discretion of the Court.

(b) The entire property of the wakf may be delivered over to the new trustees.

(c) Jai Narayan and Prag Narayan, the two adult sons of Banke Behari Lal, should be made to furnish an account of the wakf properties and to state what and where the wakf properties are. They should also be made to refund to the wakf fund any sum which may have been misappropriated by them or by their ancestor or may have been lost by misconduct or negligence of themselves or their ancestor.

(d) A scheme for management of the wakf property should be laid down.

(e) Any other relief which the circumstances of the case may require be granted to the plaintiffs.

(f) Costs of the suit be awarded against the defendant who is found to be at fault.

The chief contesting defendants in the case were Jai Narayan, and his brother, Prag Narayan, who filed a joint written statement. They pleaded that the trust in question was a private trust and not a public trust; that full discretion was allowed by the testator to the members of the committee both as to the object of the trust and the management of the trust property; that the dharamshala and the ghat were not built because the funds left for their construction were found to be insufficient; that in place of the dharamshala and the ghat the members of the

committee started a school and thereby carried out the wishes of the testator. The instance of the mortgage of Rupees 16,000 mentioned in para. 7 of the plaint was challenged. The defendants said that it was a good investment. The list of wakf property given at the foot of the plaint was challenged. The last plea was that the suit by the plaintiffs was a counterblast to the suit brought by Prag Narayan against Gauri Shanker for the recovery of sums misappropriated by his father, Raghbir Dayal, who for a long time was the Munib of the firm of the defendants. Sheo Narayan, the surviving son of Sital Prasad, practically supported the claim of the plaintiffs. Both parties gave evidence in the case, but the account books of the defendants were not produced in Court in spite of repeated demands till a very late stage, when they could be of no use as the evidence in the case had closed. The learned Judge who tried the case, after a careful consideration of the evidence, came to the following conclusions. That the will of 24th February 1904 created a charitable and religious public wakf; that the plaintiffs had a right to sue; that the committee had not carried out the objects of the wakf; that some of the members of the committee had been guilty of misconduct and that the instance given by the plaintiffs as well as the relinquishment of the claim of Rs. 10,000 against Banarsi Das together with the payment of the sum of Rs. 5,000 to the daughter of Banke Behari Lal were some of the instances of bad faith; that the trust property was worth Rs. 53,000 and that Jai Narayan should render accounts to the new committee which the Judge appointed. We have already remarked above that there are two appeals in the case. The principal appeal is by Jai Narayan and the connected appeal is by the plaintiffs. We shall dispose of both appeals by one judgment in the principal case of Jai Narayan.

The argument on behalf of Jai Narayan is somewhat different from that which was put forward in the Court below. We shall first give the heads of the arguments of the learned counsel for him and then discuss them seriatim. It is contended on behalf of the appellant Jai Narayan that the will of 24th February 1904 created no wakf at all; that if by straining of the language it be held that the will did create a wakf, that wakf was a

private one. In case the wakf is held to be a public one for charitable and religious purposes, then it is bad for vagueness. Moreover the members of the committee have from time to time dealt with the wakf property honestly and to the best of their judgment and ability and no misappropriation of any portion of the wakf property has been made, nor has any bad investment been deliberately made by any members of the committee of the wakf fund. A wakf in respect of the village of Kutubpur had been made some time prior to 1904 and no new wakf could be created by the will of 1904 and therefore the village should be left out of account. The sum found by the learned District Judge as wakf property is wrong and the real amount is Rs 33,550-7-9. It is further contended that all the defendants should have been made liable, if at all, for rendition of account and delivery of the trust property. The order of the learned District Judge with regard to the delivery of trust property is challenged on the ground that it is ultra vires as no such order can be made under S. 92, Civil P. C. As to the constitution of the new committee objection is taken to the appointment of Brahma Narayan, who is not among the descendants of Sital Prasad.

Before discussing the merits of the first objection that the will did not create a wakf at all, we would remark that this objection was not taken by the defendants in their written statement or in the argument before the lower Court or in the grounds of appeal before this Court. We have however allowed the learned counsel to urge and argue the point. He contends that the language of the will only expresses a pious wish of the testator and does not positively lay a command upon the members of the committee to do any of the things suggested in the will. Therefore the words are precatory and cannot be said to create a valid trust. After a careful perusal and examination of the language of the will which, by the way, we may remark here, we have seen and considered in the original, we are unable to agree with the learned counsel. The words of the will bearing on the point under discussion are as follows:

"I therefore give it in writing as regards the said property that I shall remain in proprietary possession of the property during my lifetime,

that as regards the moveable and immovable properties that might remain in my possession at the time of my death I make a will as follows. A committee should be formed to carry out the directions given below: The committee would have all sorts of powers regarding the management of the said properties. My eldest son, Banke Behari Lal, should be appointed as the president of the committee; Banarsi Das, my third son, should be the secretary; and Sheo Narayan, my fourth son, Jai Narayan, son of Banke Behari Lal aforesaid, Gur Narain, son of Girdhari Lal, and Gauri Shanker, son of Raghubir Dayal, should be appointed as the members of the said committee."

After giving certain directions about the constitution of the committee the testator goes on to say:

"I consider it advisable to give some of the directions below. The committee, so far as possible, shall be bound to comply with them.

(a) Bistrant (ghat) Sri Jamnaji should be built in Etawah at a cost of about Rs. 2,500.

(b) A dharamshala containing two temples, one of Sri Mahadeoji Maharaj and the other of Sri Thakurji Maharaj, should be built in Etawah at a cost of about Rs. 5,000.

(c) In the said dharamshala each of the four sons of mine should cause four small rooms to be built at his own cost, under the management of the committee, with reference to the plan of the dharmashala. The amount that might be given in charity on the occasions of the marriages of my sons, grandsons or their male children should be given in this wakf fund to the extent of 1/4th. Should anyone fail to do so, he and his sons should be debarred from holding any of the aforesaid offices so long as they do not comply with the above directions.

(d) The principal amount of cash or the property should not be utilised in defraying any expense other than those enumerated above. So far as possible about 3/4ths of the income yielded thereby, i. e., interest or profits, should be spent on the following objects according to the discretion of the committee or on any other act of charity."

The objects of charity are then specified. The rest of the will relates to the powers of the president and the secretary and the mode in which the wakf property shall be managed. There is a distinct direction that the income and the expenditure of the property shall be daily entered in the account book. It is clear from the language of the passages we have just quoted that the will in question did create a wakf. The argument on behalf of the appellant is founded upon the discretion allowed to the committee, but that discretion relates only to the management of the properties and not to the objects for which the wakf was created. The words of the will are:

"The committee would have all sorts of powers regarding the management of the said properties.

It is nowhere stated in the will that the committee could, if they chose, divert

the use of the property from the objects for which the trust was created. It is true that where charities are mentioned, the testator gives discretion to the committee to spend the income on the charities mentioned by him as well as any other that the committee might think proper, but the language would not bear the construction tried to be put upon it by the learned counsel for the appellant, to the effect that the charities specified in the will could entirely be ignored by the members of the committee. The descendants of Sital Prasad themselves understood the will to create the trust. This is not only apparent from the written statement in the present case but also from the written statement filed in the suit of 1907, already mentioned above, as also from the applications of Banke Behari Lal made to the Municipality on 12th September 1904. There were 12 meetings of the committee in all from 5th December 1907 to 29th July 1915, and at all those meetings the trust was recognized. We are therefore of opinion that the will does create a trust.

The contention for the appellant that it is a private trust has also no force. The object of the trust was the construction of a dharamshala and of a bathing ghat, at both of which not only the members of the family of the testator or the members of his religion but presumably the Hindu public, would have access. There were to be two temples in the dharamshala to which the Hindu public worshipping the idols to be installed in those temples would have free access. The feeding and the clothing of the poor who visited or resided in the dharamshala and the free distribution of medicine would also go to show that the trust was a public trust. In fact Bank Behari Lal in his applications to the Municipality, when asking for permission to build a dharamshala and a bathing ghat, describes the trust to be a public trust. We will quote one or two sentences from his applications. In his application for building the ghat he says as follows:

"According to the directions given in his will by my deceased father I wish to construct two pakka built vishrants for the good of the public and the benefit of the soul in the next world. I pray that the Government may for the benefit of the general public and the poor be pleased, etc., etc."

In his application for permission to build a dharamshala he said:

"At the time of his death my father made a will for construction of a dharamshala as well. I also want to execute the will aforesaid for the benefit in this world and in the next world as well as for public good. I file herewith two copies of maps, and pray that for the purpose of doing good to the poor, for public and charitable purposes, the dharamshala may after local inspection be permitted to be constructed."

At the various meetings of the committee that took place from time to time it was prominently brought out in the proceeding that the trust was a public trust. The proceedings are printed from pp. 28 to 42 (A). We have no hesitation in holding that the trust created by the will is a public trust for charitable and religious purposes.

The contention with regard to vagueness was however strongly pressed before us by learned counsel for Jail Narayan. In respect of this contention also we have to remark that it was not urged in the Court below at any stage of the case, nor does it find a place in the grounds of appeal here. The argument is again urged on the basis of the power of discretion given to the committee by Sital Prasad. It is contended that when the committee had full discretion to do as they thought proper both with regard to the object of the wakf and the manner of managing the wakf property there obviously was vagueness in the creation of the trust. We do not find from the will that full and unlimited power was given to the committee to do what they liked both with regard to the object of the wakf and the management of the property. On the contrary we find that the only discretion given to the committee was with regard to the management of the trust property, and that with the qualification that the corpus of the property could not be dealt with. The committee had also to a certain extent discretion as to the expenditure of a portion of the income on charity other than the charities specified by the testator. The learned counsel for the appellant first assumes that the will left everything to the members of the committee and then bases his argument on the plea of vagueness. As we have already remarked above, the will distinctly and clearly lays down the direction that a dharamshala and a bathing ghat are to be built and that three-fourths of the income of the wakf property is to be spent in the upkeep of the two buildings and towards

the support of the poor and the needy who visited the dharamshala and on the free distribution of medicine to the sick. There is no vagueness about these objects at all, nor is there any discretion left to the members of the committee about them. For the appellant several cases have been cited in support of the contention that the trust created by the will is bad for vagueness: *Gokool Nath Guha v. Issur Lochun Roy* (1), *Mussoorie Bank Limited v. Albert Charles Raynor* (2), *Kumarasami v. Subbaraya* (3), *Runchordas Vandravandas v. Parvatibai* (4), *Jugalkishore v. Lakshmandas* (5), *Grimond v. Grimond* (6) and *Blair v. Duncan* (7).

In the *Bombay* case (4) the property was left by the testator to the trustees for making a dharamshala. It was held that the words dharm dan had so many various meanings that it could not be decided for what purpose the testator left the property. The dedication was held to be void for uncertainty. The second *Bombay* case (5) to be found at p. 659 is really against the contention of the appellant. In that case it was held that because the dharamshala was attached to the temple and there was a direction for the maintenance of a sada-bart, the intention of the founder was to devote the property to public, religious and charitable purposes.

In the *Madras* case (3) a Hindu by his will after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following direction: "You should give my brothers, their wives and children according to your wishes." The contention for the beneficiaries was that a trust had been created in their favour. Their contention was disallowed on the ground that the words of the testator mentioned above did not create a trust as they were not sufficiently imperative and too vague and general.

(1) [1887] 14 Cal. 222.

(2) [1882] 4 All. 500=9 I. A. 70=4 Sar. 346 (P. C.).

(3) [1886] 9 Mad. 325.

(4) [1899] 23 Bom. 725=1 Bom. L. R. 607=3 C. W. N. 621=26 I. A. 71=7 Sar. 543 (P. O.).

(5) [1899] 23 Bom. 659=1 Bom. L. R. 118.

(6) [1905] A. C. 124=74 L. J. P. O. 35=92 L. T. 477=21 T. L. R. 323.

(7) [1902] A. C. 37=71 L. J. P. C. 22=50 W. R. 369=86 L. T. 157=18 T. L. R. 194.

The case of *Mussoorie Bank Limited v. Albert Charles Raynor* (2) is also distinguishable from the present case. In that case property was left by the testator to his wife completely, with a wish that when no longer required by her he hoped that she would deal justly by her children. It was held that the will created no trust and that the words were neither well defined nor imperative.

In the case of *Blair v. Duncan* (7) a lady by a codicil in her own handwriting directed her trustee that in a certain event one-half of the residue of her estate should be applied for such charitable or public purposes as the trustee might think proper. The words were found to be much too vague and uncertain to create a valid trust.

In the case of *Grimond v. Grimond* (6) property was left to the trustees for application to charitable or religious societies or to such institutions as the trustees might select.

In both the English cases the word "or" was taken to be disjunctive, and it was held that the language of the testator was much too vague and uncertain as to the object of the trust. We do not think that any of the cases relied upon by the learned counsel for the appellant helps him. The correct principle to determine the validity of a trust, in the words of an eminent English Judge, is whether

"the testator has pointed out the object the property and the way in which it shall go."

In the present case the objects of the trust are distinctly specified in the will by Sital Prasad, namely, the building of the ghat and the dharmashala and their maintenance and certain charities. The property is also specified in the will, for he says that the property in respect of which he creates the trust is that in respect of which he obtained a decree on 16th April 1903 and the way in which the property was to be applied is also definitely stated in the will, namely, the upkeep of the ghat and the dharmashala and the support of the charities mentioned in the will. We therefore hold that the trust created by Sital Prasad is not bad for vagueness.

The 4th objection relates to Kutubpur. It is said that no trust could have been created in respect of it by Sital Prasad, inasmuch as he himself admits by the will that a former trust existed in res-

pect of it. This plea was not taken in the Court below at any stage of the case. The decision of the question really depends upon evidence, which would disclose the facts and circumstances under which the former trust with regard to Kutubpur was made. It is quite conceivable that Sital Prasad himself made a trust in respect of Kutubpur in language which left him the power in his own lifetime of creating another trust in respect of it. The defendants had sufficient opportunity to meet the case of the plaintiffs and they could have shown by evidence circumstances under which the original trust in respect of Kutubpur was created. We therefore disallow the objection.

The objection of the appellant to that part of the decree of the lower Court which directs delivery of the trust property to the new trustees is also without foundation. It is contended that such a decree is not within the purview of S. 92, Civil P. C. We think that Cl. (h), S. 92, Civil P. C., to the effect "granting such further or other relief as the nature of the case may require" empowers a Court to make such a decree as the lower Court has done. This view is not without authority. It has been adopted in one or two cases both here and in Calcutta.

A very strenuous objection is taken to the appointment of Dharam Narayan to the new committee, on the ground that the will of Sital Prasad distinctly laid down that no one other than from among his descendants was to be a member of the committee. It is true that there is such a provision in the will, but if by death or refusal or misconduct of the descendants of Sital Prasad it appears that none of them is available for service of the committee, or if a sufficient number of them cannot be obtained to serve on the committee, the Court has power to add even strangers to the committee. In any other view of the law a trust could be defeated by a trustee or trustees by refusing to act or by misconducting themselves or by their death, if by the terms of the trust the appointment to the committee had to be made from the descendants of the testator only. Lewin in his book on "Trusts" talking of a case like the present says:

"If trustees either die in the testator's lifetime or decline the office or disagree among themselves as to the mode of execution or do not declare themselves before their death or if from any other circumstance the exercise of the power by the

party who is entrusted with it becomes impossible, the Court will substitute itself in the place of the trustees and will exercise power by the most reasonable rule: vide p. 1050."

We think that the learned Judge was right in appointing Dharam Narayan to the committee; the latter, though not a descendant of Sital Prasad, is a distant collateral.

Both the appeals therefore fail.

We modify the decree of the Court below by deleting from it the direction to Jai Narayan to render accounts to the new committee, and instead we direct that the first three defendants should pay to the new committee Rs. 48,000 with interest at 4 per cent per annum from 5th March 1904 to the date of payment less a sum of Rs. 1,308, and to deliver the houses and the share in the village of Kutubpur to the new committee. The rest of the decree is maintained.

The appeal of Jai Narain is dismissed with costs, including in this Court fees on the higher scale.

The cross-objection of Sheo Narain about his costs is disallowed.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 90 (1)

RYVES, J.

Ram Chander and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 580 of 1919, Decided on 19th November 1919, from order of Addl. Sess. Judge, Mirzapur, D/- 1st September 1919.

Criminal P. C. (5 of 1898), S. 403—No second trial on same facts for same offence.

Where a person is tried for a specific offence and is acquitted, he cannot subsequently be tried for the same offence upon the same facts.

[P 90 C 2]

A. P. Dube—for Petitioners.

Asst. Gort. Advocate—for the Crown.

Judgment.—Eight persons, all Kurmis, were convicted by a Magistrate of the First Class of rioting and causing grievous hurt, and sentenced to various terms of imprisonment and to pay fines. On appeal the learned Additional Sessions Judge of Mirzapur altered the conviction to one under S. 147 read with S. 323, I. P. C.

On revision before me it was argued that this trial was barred by the provisions of S. 403, Criminal P. C. It appears that there was a riot of some sort between certain Brahmins and certain Kurmis. The police challaned the Brah-

mins. Thereupon one Dina Nath, a Brahmin, filed a complaint in the Court of Muhammad Mahboob Alam, a Magistrate of the Third Class, charging all the present applicants with rioting with the common object of causing hurt to the Brahmins. That learned Magistrate convicted four of the accused and acquitted six. He consequently held that no charge of rioting had been made out and passed his order under S. 323, I. P. C., against four only of the Kurmis. This was on 14th May 1919. These four persons appealed to the District Magistrate, who dismissed their appeals and went on to direct that each of the four appellants should execute a bond to keep the peace under S. 106, Criminal P. C. Thereafter one Ramchander, another Brahmin, filed a complaint on which this trial was held. It is argued that the facts which were the subject of inquiry in the first trial before Muhammad Mahboob Alam are exactly the same as the facts which were inquired into in this trial, and the persons accused are the same. It seems to me therefore that under the provision of S. 403, Cl. 1, they cannot be tried again. The result is that I allow this application. I set aside the convictions and direct that the accused be set at liberty and the fines, if paid, be refunded to them.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 90 (2)

KNOX, AG. C. J.

Dunyapat and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 272 of 1919, Decided on 16th July 1919, from order of Addl. Sess. Judge, Cawnpore, D/- 27th February 1919.

Penal Code (45 of 1860), S. 379—Removal by tenants of trees fallen in storm—Customary right alleged—Copy of Wajibularz filed but did not support tenants—Conviction under S. 379 was justified.

The accused, tenants of a village, removed certain trees which had been uprooted in a duststorm. The trees were the property of the zamindar, and the accused admitted having removed them, but alleged that under a custom in the village they had the right to do so, and produced certain extracts from the Wajibularz in support of their allegation. The Court held that the removal of the trees amounted to the offence of theft, and convicted the accused accordingly.

Held: that the extracts from the wajibularz did not evidence a custom authorizing the removal of fallen trees by tenants without the consent

of the landlord: that the accused had failed to prove that the removal was not dishonest, and as the removal caused loss to the landlord which was wrongful to him and caused wrongful gain to the accused, the case fell within Illus. (a), S. 378, and the conviction was justified.

[P 91 C 2]

Iqbal Ahmad and *Mukhtar Ahmad*—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—Complaint was instituted by one Pandit Bawa Ram to the effect that on the 20th June a duststorm swept through the village of Mahotra, with the result that nine mahwa and one mango tree were uprooted. In addition to these trees uprooted by this duststorm there were two old mahwa trees which had fallen a year before and were lying on the ground. The accused, who are tenants in the village Mahotra, removed these uprooted trees and the two mahwa trees which had fallen the year previous and took possession of them. The tenants appeared and admitted having taken the trees and kept them within their possession. The Courts below have found that the removal of these trees amounted to an offence of theft.

It has been argued in revision in this Court that the act of the tenants' was wanting in the element of dishonesty which is a necessary essential of every theft. The argument is that the zamindar has been attempting to enforce his rights without having recourse to the civil Court. The case, it is said, is for the civil Courts and not for the criminal Courts. The plea is raised that there is a custom in this village whereby tenants can under such circumstances remove trees. An extract from the *Wajibularz* of 1860 and an extract from the *Wajibularz* of 1880 were read over to me as proving that the custom set up by the tenants exists and prevails in this village. I do not understand these extracts as in any way evidencing a custom authorizing tenants to remove without the consent of the zamindar whole trees which have been uprooted by duststorms. But I am not going to lay down any finding as to whether such a custom does or does not exist in the village of Mahotra; that is a matter for the civil Court. All I have to consider is whether it has been proved in this case that the tenants dishonestly removed certain trees. The Courts below have found and the tenants have admitted that they did remove the trees. It

was for them to prove that the removal was not dishonest. The removal certainly caused loss to the zamindar which was wrongful loss to him and caused wrongful gain to the accused. The accused caused this loss by means which at the time of employing those means they knew to be likely to cause it. It may well be that they had some intention of, by this act, creating as well as evidence of a custom to remove the trees in their favour. As the evidence on the record stands, that loss was wrongful loss and the case falls within Illus. (a), S. 378. I. P. C. I was referred to the case of *Rhagwat Saran Missir v. Emperor* (1). There is no finding in this case that the accused was acting bona fide, on what he supposed to be his legal right.

The sentence of fine does seem to me to be severe. I reduce the fine to a fine of Rs. 320 or Rs. 40 on each one of the accused. Of this sum, if realized, Rs. 300 will be given to Pandit Bawa Ram, who appears prima facie entitled to the trees that were removed. In other respects the sentence passed by the Court below will stand good.

V.B./R.K.

Sentence reduced.

(1) [1916] 35 I. C. 167.

A. I. R. 1919 Allahabad 91 Special Bench

MEARS, C. J., BANERJI AND
PIGGOTT, JJ.

In the matter of an application of *Sundar Lal*.

Civil Misc. Appeal No. 362 of 1919,
Decided on 10th December 1919.

(a) **Press Act (1 of 1910), S. 4 (1)—S. 4 is not ultra vires—"Government as established by law in British India" explained.**

Section 4 is not ultra vires of the Indian Legislature.

The phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs, and includes the representatives to whom the task of Government is entrusted.

[P 92 C 1]

(b) **Press Act (1 of 1910), S. 4—Where object of articles appears to be to create hatred against ruling class application of S. 4 is justified.**

Where the general tone of articles in a newspaper shows a set purpose to cause "the ruling class in India" to be hated and despised, the Local Government would be justified in exercising the powers conferred upon it by S. 4 and passing an order of forfeiture.

[P 92 C 2]

T. B. Sapru, N. C. Vaish, K. N. Katju
and *K. K. Varma*—for Applicant.

R. Malcomson—for the Crown.

Judgment.—In this case Mr. Sundar Lal has applied to the Court to set aside an order of forfeiture passed by the Local Government on 27th May 1919.

The applicant was the keeper of a printing press in Allahabad at which the newspaper *Bhavishya* was printed.

In accordance with the provisions of S. 3, Press Act (1 of 1910) he deposited on 13th February 1919 the sum of Rupees 1,500 as security.

On 11th and 25th April two articles appeared which attracted the attention of the Local Government, and they in exercise of the power conferred on them by S. 4, sub-S. 1, of the said Act, declared the security to be forfeited to His Majesty.

Thereupon Mr. Sundar Lal filed a petition in this Court under S. 17 asking that the order of forfeiture might be set aside.

The argument for the applicant fell under three heads.

At the outset he contended that the phrase "Government established by law in British India" did not include any of the persons whose conduct was censured and whose motives were impugned in the said articles.

Upon the words we are of opinion that the applicant was wrong in his contention.

On the question of ultra vires we consider that we are bound by the decision of His Majesty's Privy Council in the case of *Annie Besant v. Advocate-General of the Government of Madras* (1), and we decide this point against the applicant.

The next question is whether the words of either or both of the articles offend against S. 4, sub-S. (1) (c).

The material portion of the section is as follows :

"Whenever it appears to the Local Government that any printing press, in respect of which any security has been deposited as required by S. 3, is used for the purpose of printing or publishing any newspaper containing any words which are likely or may have a tendency to bring into hatred or contempt the Government established by law in British India or to excite disaffection towards the said Government the Local Government may declare the security deposited to be forfeited to His Majesty."

Next, he argued that S. 4 was ultra vires and finally he addressed himself to the question as to whether either or both of the articles offended against S. 4, sub-S. 1 (c).

We propose to discuss the various points

raised, in the order selected by the counsel for the applicant.

First, as to the phrase "Government established by law in British India." It was suggested that the phrase meant something different from Government in the usual conventional sense, but no very positive meaning was attributed to it but it was alleged to mean the supremacy of the British Crown and connexion with India as opposed to independence and Ss. 1, 2 and 3 of 21 & 22 Victoria, C. 106, the Queen's Proclamation of 1858 and the Delhi Clauses Act of 1912 were referred to in support of this argument.

We are of opinion that the phrase "Government established by law in British India" means the established authority which governs the country and administers its public affairs and includes the representatives to whom the task of Government is entrusted.

It is to be noted that in S. 4, sub-S. 1 (c), and in Expl. 2, the word "Government" is used as an equivalent for the phrase "Government established by law in British India." The same point was taken in *Annie Besant v. Government of Madras* (2) and the Court declined to accept the construction then sought to be placed.

The first article headed; "The Occurrence at Delhi" begins as follows ;

"The news of the fearful bloodshed at Delhi is arousing today unique and peculiar feelings in the great heart of India. The blood boils, on one side, at the sight of the incompetence, cowardice and heartlessness of the Delhi authorities, and on the other, the bravery of the people of Delhi." . . .

"Even the panic stricken authorities at Delhi must be feeling repentant at the thought that if they had acted with ordinary tact, foresight and sympathy, if they had the least regard for the life of the everdowntrodden people of this country and had not killed more than 20 and wounded more than 50 innocent persons for trifling reasons."

"Truly when the time for destruction comes the understanding becomes perverse."

"But it would be quite wrong to suppose that our worthy rulers would have committed such a blunder without an object. If we consider the crooked ways of politics and realize that it is natural for rulers all over the world to try heart and soul to maintain their privilege and prestige, we can get a clear glimpse of the object of our present rulers."

"We have now to see what was their object. Did the authorities want to prove somehow or other, (the force of) the remark of Sir William Vincent 'that there was at all times a possibility of the Satyagraha movement turning into an armed and active revolt?' Was it their object to root out, under this very pretext, the sacred Satyagraha movement before it should begin

(1) A.I.R. 1919 P.C. 31=43 Mad. 146=46 I.A. 176=52 I.C. 209 (P.C.).

(2) [1916] 39 Mad. 1085=37 I.C. 525.

to bear fruit? Did they want by taking the life of 10 or 50 innocent people by the brutal force of machine guns and white soldiers to create so much fear in the hearts of the Indian masses that they might never again venture to take part in any practical effort for the achievement of liberty?"

"Or did they want to show that in this twentieth century, when there is everywhere in the world a loud call of freedom, self-government and self-determination, when, under the powerful influence of these principles, many western empires have fallen and many despotic Emperors are being mercilessly deposed and exiled, the ruling class in India wanted to tell Indians proudly and without fear that it had made up its mind to trample under foot their hopes and aspirations, &c., and to keep them for ever under their irresponsible rule? Whichever of these may have been the object of our rulers, we are exceedingly glad to see that this time they have been quite unsuccessful in their attempt."

The second article is entitled "A Difficult Problem", and again it is only necessary to give sufficient extracts fairly to indicate the complexion of the whole article.

"At the present moment there is a very difficult problem before both the rulers and ruled in this country. Even before the great war was over, our far-sighted rulers had realized that the cry of the European nations for freedom and self-determination and the terrible lessons of the great war must inevitably produce their effects upon the minds of the Indian people. They also knew that after mutilating the Turkish Empire and taking away the freedom of Turkey, it would be impossible for them to mislead the Indian Mussalmans any longer to keep aloof from their brethren and remain indifferent to the interests of their mother country and devoted to an irresponsible (or uncontrolled) alien Government. More than anything else they realized the truth that it was (now) quite impossible for the arbitrariness of their, or any other, power to stand even for a moment before the united power of the Hindus and Musalmans in this country. It was because they realized all this that during the great war our rulers abused the Defence of India Act to their hearts' content in order to silence (paralyse?) the opening eyes and the expanding heart of this ancient but unfortunate country. As soon as the war was over, the terrible illusion called "the League of Nations" was created with the object of rendering impossible for ever the fulfilment of the aspirations of the backward nations like India; and ultimately Rowlatt Bills were devised with a view to crush all kinds of political efforts and national agitation in the future. There is no doubt that if the people of India had not already awakened to a remarkable degree, the League of Nations and the Rowlatt Bills combined would have brought a dishonourable end to the earthly life of this nation within a short time."

"While our rulers were engaged in improper efforts of this kind on one side, the curses of almost all the eastern lands from Japan and China to India and Egypt and several great and small western countries had begun to fall on this unholy League of Nations on the other side; and all the children of Bharat, becoming one heart and soul, made a firm resolve under the banner of Mahatma Gandhi to destroy the Rowlatt Bills by

means of Satyagraha" The Rowlatt Act which has been passed was to come into force six months after the conclusion of peace, but relying on the labour and self-sacrifice of our countrymen, we believe that before that time comes this inhuman law will have reached its death-bed."

"Our rulers also fully understand the present situation of the country and the unconquerable nature of the Satyagraha movement. That is why they are straining every nerve to discredit (or blacken) it and give it a bad name and annihilate it. At places they have tried to blacken this sacred movement of Satyagraha with Duragraha (persistence in error) by exciting (or inflaming) peaceful crowds, showering volleys of bullets upon unarmed and innocent people and deporting popular Hindu and Mahomedan leaders suddenly and without any reason and by various other means."

Now these extracts, in our opinion, would convey to an ordinary person that the rulers of this country, in addition to incompetence cowardice and heartlessness were guilty of the slaughter of innocent people in order to terrorise them into subjection, and to crush out all kinds of political movements and national aspirations, and further that they were perfidious enough to prevent and misapply "the Defence of India Act," with the like object, and to invent the Rowlatt Act for a similar purpose.

The general tone of both articles shows a set purpose to cause "the ruling class in India" to be hated and despised. The writer professes himself to be "astonished at the shamelessness of our ruling authorities". We can only say that we are astonished at the hardihood of the applicant preferring this appeal and in venturing to suggest, as he does in para 4 of the petition, that the

"Local Government has taken an incorrect view of the aforesaid articles and that these articles do not contain any words of the nature described in S. 4, sub-S. 1, Press Act."

It need scarcely be said that they cannot by any argument be brought within Expl. 2, S. 4. It being the first duty of a Government to govern, we should have considered the local Government strangely lacking in its duty if it had failed to step in and put a penalty on the dissemination of envenomed articles such as those.

We therefore reject the petition and order the applicant to pay the costs with fees on the higher scale.

V.B./R.K.

Petition rejected.

A. I. R. 1919 Allahabad 94

RYVES, J.

Basdeo—Defendant—Appellant.

v.

Behari Lal—Plaintiff—Respondent.

Second Appeal No. 1503 of 1917, Decided on 31st October 1919, against decree of First Addl. Judge, Aligarh, D/- 7th September 1917.

(a) **Transfer of Property Act (4 of 1882), Ss. 58 and 60—Document to redeem mortgage—No form is prescribed.**

No particular form of document is required to redeem a mortgage. [P 94 C 2]

(b) **Registration Act (16 of 1908), Ss. 17 and 49—Receipt evidencing redemption must be registered—Unregistered receipt of redemption coupled with fact that mortgagor was put in possession can lead to conclusion that mortgage is redeemed.**

An unregistered receipt cannot in itself be used as evidence of redemption of a mortgage, but the Court is entitled to take it into consideration as evidence of the fact that on a particular date a particular sum was paid by the mortgagor to the mortgagee, and this coupled with the fact that the mortgagor was put into possession of the property and has continued in possession of it is good evidence upon which the Court might base its finding that the mortgage has been redeemed. [P 94 C 2]

(c) **Provincial Small Cause Courts Act (9 of 1887), Art. 31—Suit by mortgagor after redemption for mesne profits and for value of trees cut by mortgagee is not cognizable.**

A suit by a mortgagor, after redemption, to recover from the mortgagee the profits of the mortgaged property and the value of certain trees alleged to have been cut down by the defendant is exempted from the cognizance of a Small Cause Court by Art. 31 and is therefore cognizable by a civil Court. [P 94 C 2]

P. L. Banerjee—for Appellant.

Panna Lal—for Respondent.

Judgment.—The facts out of which this appeal arises are as follows: The plaintiff sued to recover one-third of the profits of a grove plus one-third of the value of certain trees which he alleged had been cut down by the defendants. The plaintiff's title was based on his assertion that he had redeemed one-third of the mortgage on the property. The Court of first instance dismissed the suit, holding that redemption had not been proved. On appeal the learned Additional Judge of Aligarh allowed the appeal and decreed the suit. On appeal before me the main argument is that the lower appellate Court should not have admitted in evidence a certain receipt and that if that receipt were not admitted there would be no legal evidence on which the Court could base its findings. The objection to the receipt is to

the effect that it had not been registered. Not having been registered, obviously it could not be used in itself as evidence of redemption of the mortgage. It in itself could not in any way affect the mortgage, but I think the lower Court was entitled to take it into consideration as evidence of the fact that on such a date so much money had been paid and that coupled with the fact that one-third of the mortgaged property was then given into possession of the plaintiff and has been in his possession ever since, was good evidence on which he could find as a fact that the plaintiff had redeemed one-third of the mortgage. No particular form of document is required to redeem a mortgage. That being so, in my opinion the appeal fails. As my decision is open to appeal under the Letters Patent, I proceed to decide a preliminary objection which was raised as to the hearing of this appeal. It was argued by Mr. Panna Lal on behalf of the plaintiff that S. 102, Civil P. C., barred this appeal as the suit was of the nature of a Small Cause Court suit and its value was less than Rs. 500. On behalf of the appellant it was urged that under Art. 31 of the Schedule to the Provincial Small Cause Courts Act (9 of 1887) such a suit was exempted from the cognizance of a Court of Small Causes. Mr. Panna Lal relied on a case reported as *Bindraban v. Sakhodra* (1), which was a decision of a Division Bench. That case is however not very helpful, because neither in the arguments nor in the judgment itself is any reference made to Art. 31 of the Schedule, nor are any reasons given in the judgment for the view which was taken. In *Sheo Bodh v. Surjan* (2) and in *Drig Pal Singh v. Kunjal* (3) the scope of Art. 31 has been considered and it seems to me that according to the view taken in those two rulings this suit would come within the scope of the concluding part of Art. 31. I therefore overrule the preliminary objection. The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) [1913] 21 I. C. 638.

(2) [1913] 19 I. C. 427.

(3) [1918] 40 All. 142=44 I. C. 689.

A. I. R. 1919 Allahabad 95

KNOX, J.

Sita Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 738 of 1919, Decided on 10th December 1919, against order of Sess. Judge, Gorakhpur, D/- 22nd September 1919.

Penal Code (45 of 1860), S. 409—Officer in post office paying less than due on cash certificate and appropriating the balance to himself commits breach of trust.

Where in cashing postal cash certificates an officer of the post office pays to the holders of the certificates a sum less than what is due and appropriates the balance for his own use, he commits the offence of criminal breach of trust punishable under S. 409, I. P. C. [P 96 C 1]

Shiva Prasad Sinha—for Applicant.

Judgment.—*Sita Ram* has filed an application for revision of an order passed by the Sessions Judge of Gorakhpur, dated 22nd September 1919, whereby he has sentenced the said *Sita Ram* to undergo six months' rigorous imprisonment on each of three separate counts. The sentences are to run consecutively. They are passed under S. 409, I. P. C. There is also a sentence of solitary confinement and fine.

The grounds taken on which I am asked to revise are:

(1) Because the evidence does not warrant the conviction of the applicant and the propriety of the finding, sentence and order; (2) because no offence against the accused has in a proper view of the case been made out; and (3) that the sentences are unduly severe.

The applicant at the time the offences were committed was Sub Post Master of Bridgemanganj Sub Post Office. In the course of his official work he had to issue certain cash certificates.

The certificates were issued at Rs. 7-12-0. He was asked to encash them at a time when under each certificate the holder was entitled to receive Rs. 8-2-6. He encashed the certificates and handed over Rs. 7-6-6 on each certificate and took a receipt to the effect that he was paying over Rs. 8-2-6 while in fact he only paid over to each man Rs. 7-6-6. It is contended that inasmuch as no loss or damage has been caused to Government no offence has been committed under S. 409. Now S. 409 is criminal breach of trust by a public servant, and in substance the contention is that he may or may not have paid to the holder of the cash certificates

less than they were entitled to, but that he had committed no criminal breach of trust so far as the Government was concerned. I fail to understand this contention. The Government had made over to the accused upon each of these cash certificates the sum of Rs. 8-2-6. It had given this money to the accused as a trust, and he had accepted it as a trust binding him to pay to each certificate holder the sum of Rs. 8-2-6. Out of that sum he paid Rs. 7-6-6 and there was a sum of 12 annas remaining with the accused as money entrusted to him for the purpose of payment to the cash certificate holder. He put 12 annas of this trust money into his pocket and did not pay it to the holder of the cash certificate. So far as appears from the record, he has not even now paid this deficient sum to the complainants. That is the offence which the accused has committed. He has not carried out the trust reposed in him by the Government, but has diverted a portion of that trust to his own private ends.

The learned vakil who appears for the applicant has, in support of his contention, referred to the case of *Queen-Empress v. Ganpat Tapidas* (1). That case differs very much from the one before me and can be easily distinguished. At the time when the accused diverted a portion of the trust reposed in him, the date was 26th June 1919. It is now all but six months since that portion of the money entrusted to him for payment to the complainants has been retained by the applicant. There is nothing in the record to show that the complainants, *Ram Prasad Bhole* and *Takuri*, consented to the retainment by the accused of this money. Anyhow the 12 annas which the Government entrusted to the accused for payment to the certificate holders in part payment of the cash certificates has not been paid to them. That money has been retained by the accused. With all due respect to the learned Judges who decided the case referred to, I am not prepared to agree with them when they say that the appellant before them had fulfilled the trust reposed in him by Government. However the evidence in that case is not before me and there may have been something in it which justified the statement. In the case before me I hold that the very fact of the accused taking 12 annas and putting it into his own

(1) [1886] 10 Bom. 256.

pocket, instead of paying it over to the holder of the cash certificate, was a criminal breach of trust. I see no reason to interfere and dismiss the application.

It is contended that the punishment is unduly severe. The punishment for an offence under S. 409 may amount to transportation for life or to ten years' rigorous imprisonment. Bearing this in mind, I do not find the punishment in this case is unduly severe.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 96 (1)

RYVES, J.

Chhittar and others—Defendants—Appellants.

v.

Harju—Plaintiff—Respondent.

Second Appeal No. 1555 of 1917, Decided on 31st October 1919, against decree of Dist. Judge, Shahjahanpur, D/- 27th July 1917.

Civil P. C. (5 of 1908), S. 20(c)—Cause of action for restitution of conjugal rights against wife arises where husband resides.

In a suit by a husband against his wife for restitution of conjugal rights the cause of action arises in the wife absenting herself from the husband's residence and therefore a Court within the local limits of whose jurisdiction such residence is situate is competent to try such suit.

[P 96 C 1]

M. L. Sandal—for Appellants.

Judgment.—This appeal arises out of a suit brought by the plaintiff against his wife for restitution of conjugal rights and against three other defendants, praying that an injunction be issued against them not to interfere in any way with the plaintiff's wife coming to reside with him. The suit was brought in the Court of the Munsif of Shahjahanpur. The defendants all reside in the District of Hardoi in the Province of Oudh. The trial Court decreed the suit. The defendants other than defendant 1, the wife, appealed. In their grounds of appeal it was urged that the suit was not cognizable by the Court of Shahjahanpur. The same plea had been raised in the trial Court and formed the subject of an issue. There the Court held, and rightly held following the ruling of *Lalitagar Keshargar v. Bai Suraj* (1), that the cause of action against the wife arose in absenting herself from the plaintiff's residence, which was in Shahjahanpur. It is not quite clear how the Court had jurisdiction against the other defendants. But I find that neither Court

(1) [1894] 18 Bom. 316.

has come to any finding that the present appellants prevented or would in the future prevent defendant 1, the wife going back to her husband. This being so, I think the appeal must succeed. The result is that I allow the appeal and set aside the decree of the Court below so far as it affects the appellants. They are entitled to their costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 96 (2)

STUART AND WALLACH, JJ.

Gajkumar Chandar—Plaintiff—Petitioner.

v.

Salamat Ali and another—Defendants—Opposite Parties.

Civil Revn. No. 103 of 1918, Decided on 6th August 1919, from order of Dist. Judge, Allahabad, D/- 8th February 1918.

Agra Tenancy Act (2 of 1901), S. 167—No revision lies against appellate order in case under S. 167.

The High Court has no power to entertain an application for revision against an order passed in appeal against the decision of an Assistant Collector in a matter covered by the provisions of S. 167.

[P 97 C 1]

Gulzari Lal—for Petitioner.

G. L. Agarwala—for Opposite Parties.

Judgment.—The decision of this revision has been referred to a Bench of two Judges in view of the difference of opinion between the Judges who decided *Parbhu Narain Singh v. Harbans Lal* (1). The point is this. Does a revision under S. 115, Civil P. C., lie against the order of a District Judge in an appeal against the decision of an Assistant Collector in a matter under the provisions of S. 167, of the Local Act 2 of 1901? We have heard the arguments. The arguments to the effect that no such revision lies can briefly be stated as follows: Under the provisions of S. 167 of the Local Act 2 of 1901, all suits and applications of the nature specified in Sch. 4 shall be heard and determined by the Revenue Courts and except in the way of appeal, as hereinafter provided no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. The authority of Courts for dealing with the matters provided for by that Act is to be found in the provisions of the Act itself. Revenue Courts only

(1) [1916] 35 I. C. 279.

have authority to deal with original matters. Revenue Courts in some instances and civil Courts in other instances have authority to deal with matters in appeal. The Act confers powers in revision under the provisions of S. 185 on the Board of Revenue alone. What authority then we are asked, has the High Court "except in the way of appeal as hereinafter provided." According to this argument the High Court has necessarily no revisional authority. The arguments on the other side are to the effect that S. 115, Civil P. C., confers upon the High Court revisional jurisdiction over all civil Courts subordinate to itself. As a District Judge's Court is subordinate to the High Court, it follows according to this argument that the High Court must have powers to revise any orders passed by a District Judge. Great stress is laid in this connexion upon the provisions of S. 193 of the Local Act 2 of 1901, and we have been asked to note that the provisions of the old S. 622, Civil P. C. are not excluded under the provisions of S. 193. After considering the point we are of opinion that the argument against the existence of revisional powers of the High Court in these matters must prevail; the fact that there is no exclusion of S. 622 in S. 193 does not affect the question, for the provisions of the Code of Civil Procedure apply to the procedure in suits and other proceedings under the Rent Act so far as they are not inconsistent therewith. Thus the only power that the High Court has to dispose of matters covered by the Local Act 2 of 1901 is given by the Act itself and the power of revision is not a power which is so given to it. In other words, we accept the view of Piggott, J. in *Parbhu Narain Singh v. Harbans Lal* (1): "I am, as at present advised, of opinion that it would be doing violence to the words of the last clause of S. 167, Tenancy Act, for this Court to entertain the present application at all."

The same view was taken by Tudball, J., in *Mohammad Ehtisham Ali v. Lalji Singh* (2). We therefore find that the High Court has no power to entertain an application for revision against an order passed in appeal by a District Judge against the decision of an Assistant Collector. We accept the preliminary objection and dismiss this revision with costs.

V.B./R.K.

Revision dismissed.

(2) [1919] 41 All. 226=49 I. C. 362.

A. I. R. 1919 Allahabad 97

MEARS, C. J. AND BANERJI, J.

Muzaffar Ali and others—Defendants
—Appellants.

v.

Muhammad Jawad—Plaintiff — Respondent.

Privy Council Appeal No 37 of 1919, Decided on 28th November 1919, application for leave to appeal to His Majesty in Council.

Civil P. C. (1908), S. 109—Value of subject-matter less than Rs. 10,000—Question involved simply of evidence—No certificate should be granted.

Where the subject matter of a suit is less than Rs. 10,000 in value, and the sole question upon which the decision of the case rests is one of evidence, the point is not one of general interest and importance to justify the grant of a certificate that the case is a fit one for appeal to the Privy Council.

[P 98 C 2]

S. A. Haidar—for Appellants.*S. M. Sulaiman*—for Respondent.

Judgment.—This is an application for leave to appeal to His Majesty in Council in a case in which the value of the suit and of the proposed appeal is under Rs. 10,000. But it is said that this is an appeal which is otherwise fit to be brought to the attention of the Privy Council, by reason of the fact that the appeal will turn upon a question of general interest and importance. Now the one point which has been argued is a point which is really a matter of evidence. In the suit one main question was as to the amount of the dower of a lady, named Mt. Sakina Begam. That was in dispute and with a view to influence the Court the kabinnama (deed of dower) of her sister was produced and was put forward to add weight to the contention that her dower was probably the same amount, or approximately the same amount, as that alleged by the defendants to have been the dower of Mt. Sakina Begam.

Now the counsel, who appears to support this application, says that in a case in which the question before the Court is as to the amount of the agreed dower, it is incompetent for the Court to permit evidence to be given of any customary dower which may happen to prevail in the particular family to which the lady belongs, and in support of that proposition he has brought our attention to a case which is found reported as *Fazil Khan v. Mt. Karm Begam* (1). When

(1) A. I. R. 1914 Lah. 514=105 P. R. 1914=27 I. C. 113.

that case comes to be looked at, it is found to be a proposition for a most elementary point of law, and the elementary point of law that that case decides is that when a Judge has a duty to decide case *A*, he must not turn away and decide case *B*. In that case the plaintiff came forward and asserted that the dower was a specified sum due under a contract. At the end of the case the Judge gave her a decree based not on a contract but based upon something which he found to be a customary dower prevailing in the lady's family. Well he had no right to turn an action of contract into an action based upon a custom. But here the question arises in rather a different form. Neither the trial Court nor the High Court here admitted the kabinnama for the purpose of turning a claim by contract into a claim of custom—but they used it, as they were entitled to use it, in order that having looked at the document it should have some weight on their minds as to the probability of the truth of the case on either side; and as the Court has already pointed out, S. 11, Evidence Act, contemplates just the very thing. You may get sets of circumstances which are strongly evidentiary of the truth of what witnesses say, and those sets of circumstances may be so sufficiently near to the issue in the case as to make it right and proper for them to be brought to the notice of the Court so that the Court should be influenced by them.

Now we feel that where there is litigation as to the amount of dower which a lady says was due to her by virtue of a contract, that it is some evidence, at all events certainly receivable evidence, that in her family there was a custom that her dower should be so much, that 2, 3 or 4 of her sisters had been married, that they had each received dower of that amount, we feel that evidence of that kind would raise a presumption, if there were no outstanding points of difference, that her dower would in like circumstances be somewhere about the same amount as the customary dower. It would be evidence which a Judge would be at liberty to reject but also at liberty to give weight to. But of course he must not give a decree on the basis of customary dower. He should give his decree on the basis that the lady, having alleged a contract has proved an agreement to his satisfaction. It is a pure

point of evidence and no authority dealing with the law of evidence has been cited to us. Under these circumstances we are of opinion that not only it is not a point of general interest, but it is not a point really arguable. The application must therefore be dismissed with costs, including fees on the higher scale. We order accordingly.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 98

LINDSAY, J.

Lachhmi Narain—Petitioner.

v.

Sheo Nath Pandey and others—Opposite Parties.

Civil Revn. No. 40 of 1919, Decided on 22nd November 1919, from order of Sub-Judge, Mirzapur, D/- 12th December 1918.

(a) **Civil P. C. (5 of 1908), S. 104 (f) and Sch. 2, paras. 15 and 21—Order filing award is appealable—Passing of decree in terms of award does not affect.**

An order directing an award to be filed is appealable. The fact that a decree is drawn up in terms of the award has not the effect of taking away the right of appeal against the order.

[P 99 C 1]

(b) **Civil P. C. (5 of 1908), Sch. 2, paras. 15 and 21—Award on one's personal knowledge without taking evidence not contemplated by reference is invalid.**

Where, in the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence an arbitrator does so decide a dispute, his act is fatal to the award on the ground of misconduct.

[P 99 C 1, 2]

S. D. Sinha—for Petitioner.

S. N. Sen—for Opposite Parties.

Judgment.—The application has reference to an order passed in appeal in certain arbitration proceedings. It appears that the plaintiff-petitioner applied to the Court of the Munsif to have an award made a rule of Court. This application was made under para. 20, Sch. 2, Civil P. C. The Munsif followed the procedure laid down in this paragraph and eventually wrote an order directing the award to be filed, and thereafter a decree was prepared on the basis of the award in accordance with the provisions of para. 21 (2) of the schedule. The defendants went in appeal to the lower appellate Court against the order directing the filing of the award. The lower appellate Court entertained the appeal, set aside the order of the Court of first instance and directed that the application for the filing of the award should be dis-

missed. The plaintiff now comes here in revision, and the first ground taken is that the Court below acted without jurisdiction in entertaining the appeal. The learned counsel for the petitioner had to admit that S. 104 (f), Civil P. C., clearly lays down that an appeal does lie against an order filing or refusing to file an award in an arbitration made without the intervention of the Court. But according to the ground taken in the first paragraph of the memorandum no appeal lay because the order of the first Court directing the award to be filed had become merged in a decree, and admittedly no appeal lies against the decree. It is only necessary to say that the law and the cases seem to be against this contention of the applicant, and I am referred in this connexion to a case reported as *Soudamini Ghose v. Gopal Chandra Ghose* (1). For a further authority see *Hari Kunwar v. Lakhmi Ram Jani* (2). At p. 488 (of 14 A. L. J.) of the report, the Judges dealing with this very matter point out that the bare fact that a decree has been drawn up after the passing of the order cannot take away the right of appeal against the order.

The first ground therefore fails. The other point which has been argued is that the Court below acted with material irregularity in discussing certain pleas of misconduct which, it is said, were not raised in the Court of first instance. It is true that in the first Court the defendants, by way of answer to the application made general allegations of misconduct against the arbitrator. However this may be, it is certain that one definite allegation of misconduct was raised in the first Court, namely that the arbitrator had decided the case of his own knowledge and without taking any evidence from the parties. The learned Judge of the Court below finds that this was the case, and accordingly he has held that the arbitration is null and void. It is argued here that the mere fact that the arbitrator decided the case of his own knowledge and without taking any evidence does not amount to misconduct. This matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between

them on his own knowledge, and further agreed that there was no need for him to take any evidence, no misconduct can be disputed. But there is nothing in the language of the agreement to suggest that it was the intention of the parties that the arbitrator should act solely upon his own knowledge of the facts. That he has done so is fatal to the award, in which he expressly says that he has decided the case upon the basis of his own knowledge. I am satisfied therefore that the order of the Court below is correct, and there is no ground on which I can interfere. The application is dismissed with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 99

TUDBALL AND RAFIQUE, JJ.

Jaipal Rai—Plaintiff—Appellant.

v.

Sahdeo Rai and *others*—Defendants—Respondents.

Second Appeal No. 870 of 1918, Decided on 18th December 1919, against decree of Dist. Judge, Azamgarh, D/- 9th March 1918.

Pre-emption—Custom—Wajibularz recording custom that in case of sale first offer must be made to nearer cosharer and then to other cosharers—Cosharers have preferential rights inter se.

The *Wajibularz* of a village held on bighadam tenure provided that when a cosharer wished to sell, he must first offer his share to his near cosharer, and in case of his refusal to any other cosharer in the village, and if they refuse he may sell to a stranger.

Held: that the custom thus recorded meant that a near cosharer had the first right to purchase as compared with the more distant cosharers in the village, and that the cosharers had preferential rights of pre-emption inter se.

[P100 C 1]

S. N. Sen—for Appellant.

Kamlakant Varma—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. It has been dismissed by both the Courts below. The plaintiff, the vendor and the vendee are all coshares in the village. The plaintiff and the vendor are cosharers in the same khata. The vendee is a cosharer in another khata. The village is one held on bighadam tenure. The question is whether or not the cosharers have preferential rights of pre-emption inter se. The *Wajibularz* states that when a cosharer wishes to sell or mortgage, he offers his share first of all to his near cosharer and in case of his refusal to any other cosharer in the village, and if they refuse

(1) [1915] 28 I. C. 557.

(2) [1916] 38 All. 380=35 I. C. 833.

then he may sell to a stranger. The record then goes on to say :

"If he sells it to a stranger in spite of the willingness of a cosharer, the latter will be at liberty to enforce his right of pre-emption and to take the property at the market value."

Both the Courts below have held that on the face of a custom expressed in these words the right of pre-emption only arises in the case of a transfer to a stranger. They have based their opinion on certain old rulings of this Court to be found in the case of *Narain Saran Singh v. Sidh Narain Singh* (1) and in the case of *Sheobalak Singh v. Lachmidar* (2). There are other rulings to the contrary effect. It seems to us that the custom clearly means that when a co-sharer wishes to sell he has to offer it first of all to his near cosharer. In other words a near cosharer has the first right to purchase the property as compared with the more distant cosharer in the village. We do not think that the subsequent statement that in case of a sale to a stranger a willing cosharer may pre-empt affects the statement of the rights of cosharers inter se. The case is somewhat similar to the case of *Gurdial v. Mathura Singh* (3). We do not think that there is any doubt in the case that the plaintiff has a preferential right of purchase as compared with the respondents vendees. There is an issue as to what is the true sale price. This issue was not decided by either of the Courts below. It is issue 3 in the first Court. This must be decided before we can pass a final decree in this case. We therefore remand the issue to the Court below for decision at a very early date on the evidence which is already on the record before us. The usual ten days will be allowed on receipt of the finding.

V.B./R.K. *Issue remitted.*

(1) [1908] 5 A. L. J. 655=(1908) A.W.N. 251.

(2) [1901] 23 All. 427=(1901) A.W.N. 120.

(3) [1910] 6 I. C. 920.

A. I. R 1919 Allahabad 100

LINDSAY, J.

Makhan Lal—Plaintiff—Petitioner.

v.

Municipal Board of Agra—Respondents.

Civil Revn. No. 59 of 1919, Decided on 24th November 1919, against order of Small Cause Court Judge, Agra. D. 5th September 1919.

U P. Municipalities Act (2 of 1916), S. 326—Suit for refund of octroi duty dismissed as time barred—In revision suit held for compensation within sub-S. (1) and sub-S. (3) was applied.

Plaintiff instituted a suit against the Municipal Board of Agra to recover a sum of money to which he was entitled under the rules, as refund of octroi duty on goods exported by him from Agra. The suit was dismissed as having been brought beyond the period of six months prescribed by sub-S. (3), S. 326. The High Court was moved in revision against the order of dismissal, and it was contended that the provisions of the foregoing subsection referred only to suits arising out of acts done inadvertently or illegally for which a suit for damages would lie and that that subsection did not apply to suits for money demandable from a Municipal Board in consequence of a legal relation resembling a contract:

Held: that inasmuch as the plaintiff's cause of action had its origin in the refusal of the Municipal Board to pay, a sum which it was legally bound to pay the suit as framed was a suits for compensation within the description of suits in sub-S. (1), S. 326 and was not founded upon a breach of contract or the breach of some relation resembling a contract and that therefore the rule of limitation contained in sub-S. (3), of the section was applicable to it. [P 102 C 1]

Nihal Chand—for Petitioner.

N. P. Ashthana—for Respondent.

Judgment.—This case involves the interpretation of S. 326, United Provinces Municipalities Act (United Provinces Act 2 of 1916). The suit out of which this application has arisen was brought by the plaintiff-petitioner, Lala Makhan Lal, against the Municipal Board of Agra. The claim was to recover a sum of Rs. 218-10-6. According to the facts set out in the plaint the plaintiff is a cloth dealer in Agra who at various times had exported from Agra cloth of considerable value. He claimed that he was entitled by reason of this export, to have from the Municipal Board a refund of octroi duty. He put in a claim to the Board and his case is that the Board refused to pay to him the full amount to which he was entitled. The balance, which, he said, was owing to him from the Municipal Board, came to Rs. 218-10-6. In para. 6 of the plaint it was stated that the cause of action had arisen on 31st October 1917, when the Board refused to pay him the balance claimed.

One of the pleas which was raised by way of defence was that the suit was barred by limitation. This was founded on the provision of S. 326, United Provinces Municipalities Act, sub-S. (3). The Court below gave effect to the plea and dismissed the plaintiff's suit on the ground that it was time barred. I am

not concerned here with any other pleas which were raised in the written statement. The argument before me is that the Court below misinterpreted S. 326 and was wrong in holding that the suit was barred by limitation.

The law relating to the refund of octroi duty is contained in statutory rules which were made under the provisions of the Municipalities Act. On referring to the Municipal Manual, Vol. 2, p. 21, para. 73, I find it stated that

"a person who exports from a Municipality any goods on which, if they were being imported, octroi would be leviable shall be entitled to receive payment of a sum equivalent to that octroi. This payment (the rule declares) shall be described as refund."

It seems clear therefore that under the provisions of these rules which have the force of law a legal duty is imposed upon a Municipal Board to grant a refund of octroi duty in the cases contemplated by the rules and with the duty a corresponding right arises in favour of the exporter.

Turning now to the provisions of S. 326, Municipalities Act we find that sub-S. (1) provides for the giving of notice of intention to sue when any person desires to institute a suit against a Board or against a member, officer or servant of a Board in respect of an act done or purporting to have been done in its or his official capacity. The sub section requires that a notice of the claim shall be given in the manner prescribed in the subsection, but with these provisions of this subsection we are not concerned. Coming then to sub-S. (3) we find it laid down that

"no action such as is described in sub-S. (1) shall unless it is an action for the recovery of immovable property or for a declaration of title thereto be commenced otherwise than within six months next after the accrual of the cause of action."

It is obvious that the actions referred to in sub-S. (3) are the suits which are referred to in sub-S. (1), and it was by applying the terms of sub-S. (3) to the facts of this case that the Court below came to the conclusion that the suit was barred. In order to avoid the application of this special law of limitation it was urged in the Court below that the plaintiff was not seeking damages or compensation and consequently the suit was not a suit of the nature described in sub-S. (1), the result being that the period of limitation laid down in sub-S. 3 could not be applied. The same argument has been repeated

here though in a somewhat different form. It has been contended that S. 326, sub-S. (1), refers only to suits arising out of acts done inadvertently, or illegally for which a suit for damages will lie. It has been said that the subsection does not apply to suits for money demandable from the Board or a member, officer or servant of a Board. The argument in another way is that the suits referred to in sub-S. (1) are suits based upon tort or quasi tort and do not include suits for which the cause of action assigned is a breach of contract or of a legal relation resembling contract.

Several cases have been cited before me, to which I need not refer in giving this judgment. None of them lays down any interpretation of this particular section and as I am of opinion that the wording of the section is quite clear, I deem it unnecessary to refer to any of these authorities.

In the first place it seems to me that S. 326, sub-S. (1), refers to all suits in which it is intended to bring a suit in respect of an act done or purporting to have been done by a Board or by member officer or servant of a Board in its or his official capacity that is to say suits in which the cause of action has arisen out of an act done or purporting to have been done by a Municipal Board or by any of its members or servants. There is no attempt in the subsection to define suits in accordance with the nature of the relief sought. It is quite true that in prescribing the formalities which must be observed when a notice of an intended suit is being given, it is laid down that the intending plaintiff must specify the nature of the relief sought and also the amount of compensation claimed, that is to say, if the claim is a claim for compensation the amount which the plaintiff desires to recover must be specified. But it is not right to say that there is any justification in the language of the subsection for the contention that suits are to be divided into suits in which compensation is being sought and into suits in which no compensation is being sought. If we refer to sub-S. (3) the point becomes perfectly clear. I have already quoted the language of this section and pointed out that it lays down a rule of limitation for all suits referred to in sub-S. (1), "except suits for the recovery of immovable property or for a declaration of title."

I might also refer to the language of sub-S. (4), which shows that in a suit to which sub-S. (1) applies relief may be sought by way of injunction. The fact appears, therefore that the intention of the section is that all suits which claim to have their origin in an act done or purporting to have been done under colour of the Act by a Municipal Board or its members or servants are subject to the special law of limitation laid down in the section.

If the argument of the learned counsel for the petitioner is that this suit is not based on tort, I am unable to agree with him. I have already pointed out that a legal duty is laid upon a Municipal Board in virtue of the rule which has been framed under the Act and which relates to refund of octroi duty. A breach of a legal duty is a tort and gives rise to an action. I do not accept the argument that this action is founded upon a breach of contract or the breach of some relation resembling a contract. I do not see how it can be argued that there was any contract between the parties in this case by which the defendant Board was legally bound to hand over this money to the plaintiff. The duty is laid upon a Board by a rule carrying the force of law, and consequently as the plaintiff alleges a breach of the legal duty he cannot be heard to say that his action was not founded on tort. I have already pointed out that in para. 6 of the plaint the cause of action which was alleged, was the refusal by the Municipal Board to pay over to the plaintiff the money to which he said he was entitled under the rules. Further I am of opinion that as framed the suit is a suit for compensation. The plaintiff is in reality asking for damages by way of reparation for the tortious act committed by the defendant Board, and in that view even according to the argument of the learned counsel for the petitioner the suit is one of the suits described in sub-S. (1), S. 326.

For these reasons I am satisfied that the judgment of the Court below is correct and should be maintained. The application is dismissed accordingly with costs to the opposite party including fees in this Court on the higher scale.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 102

WALSH AND STUART, JJ.

Kalyan Mal and others—Petitioners.

v.

Kishen Chand—Opposite Party.

Civil Misc. Ref. No. 197 of 1918, Decided on 20th May 1919.

(a) **Contract Act (9 of 1872), S. 161**—On refusal to return on demand makes bailee's possession unlawful and owner may sue in tort or in detinue or on contract.

It is an implied term of every contract of bailment or deposit that the goods bailed or deposited shall be returned on demand, and the failure to return them is a breach of contract. If a demand for the return of the goods is not complied with, the possession of the bailee or depositor becomes unlawful and the owner may sue in detinue but it is also open to him to sue in contract or in tort.

[P 103 C 1]

(b) **Limitation Act (9 of 1908), Art. 60**—Suit to recover specific coins from bailee is governed by Art. 60.

A suit to recover specific coins entrusted to a bailee, or their value is for the purpose of limitation governed by Art. 60.

[P 103 C 1]

(c) **Limitation Act (9 of 1908), Arts. 49 and 145**—Suit against depository for recovery of property is governed by Art. 145—But on refusal to return on demand Art. 49 applies.

The period of limitation for a suit against a depository to recover property, pictures and manuscripts, is provided by Art. 145; but when upon demand the property is not forthcoming the suit may be treated as one in tort and Art. 49 would furnish the period within which the suit must be brought. In the latter case limitation would begin to run from the date on which the goods are demanded and are refused. [P 103 C 1, 2]

M. L. Agarwala and Bhagwan Das—for Petitioners.

T. B. Sapru and Kamla Kant Varma—for Opposite Party.

Judgment. — This is a reference under S. 18, Ajmere Courts Regulation 1 of 1877. In our opinion, on the facts which have been found, the case is remarkably clear and simple. The Courts of Ajmere have taken the right view though they have not expressed very happily the precise articles under the Limitation Act which they think destroy the defence set up. The facts show that there were originally two contracts of bailment under S. 43, Contract Act, 400 gold mohurs having been entrusted to Mt. Chun Kuar, to some extent, through her husband and certain pictures and manuscripts to Sobhag Mal, for specific purposes. Those contracts of bailment or deposit conferred upon the person to whom the goods were entrusted variously called the bailee or the depositor, lawful possession, to entitle the owner to sue and re-possess himself by suit of the

goods, or to recover damages for their loss, if they are not restored to him he must make a demand. He may of course sue in contract. It is an implied term of every such contract that the goods shall be returned on demand. The failure to return them is a breach of contract. On the other hand he may sue in tort, and from the moment he makes a demand for the return of the goods, if that demand is not complied with the possession of the person, the deposittee or bailee becomes unlawful, and the owner may sue in what is called detinue. To constitute a cause of action for detinue he must make a formal demand for the goods. Once these principles are understood the application of the appropriate article of the Statute of Limitations becomes simple. We do not think that S. 10, Lim. Act, has anything to do with it. So far as the gold mohurs are concerned, we think Art. 60 applies. The plaintiff elected to treat them as money. Specific coins entrusted to a bailee for a given purpose to be returned in specie may constitute moveable property. They are also money. We do not agree with the Courts below that the case has anything to do with deposit with a banker, but so far as the claim for the gold mohurs or their value is concerned, it is clearly a suit for money deposited under an agreement that it shall be payable on demand. The statute begins to run when the demand is made. The demand in this case was made within three years of the commencement of the suit. So far as that portion of the suit is concerned the defence failed.

With regard to the pictures and manuscripts we think that the contract was clearly one of deposit and that the suit is covered by Art. 145 being one against the depository to recover the moveable property deposited. The period for that suit provided by the Limitation Act is 30 years. This suit is therefore within time so far as the pictures and manuscripts are concerned. Inasmuch as a demand for the return of the goods has been found to have been made and they are not forthcoming the suit may be treated equally in the alternative, as one in tort, and Art. 49 would apply to such a suit, being a suit for the return of specific property wrongfully detained. The period for that suit begins to run when the detainer's possession becomes unlaw-

ful. Being lawful in its origin it does not become unlawful until a demand is made and rejected.

The answers to the questions in reference must therefore be as follows: (1) With regard to the 400 gold mohurs Art. 60 applies. (2) The answer to question No. 2 is: It is not a deposit with a banker; but Art. 49 or Art. 145 are equally applicable. (3) The answer to question No. 3, namely: Is the order of the Hon'ble the Chief Commissioner appointing the applicants to be the legal representatives of Mt. Chun Kuar, not binding in the further proceedings in the case? and are the applicants not her legal representatives under S. 2 (11), Civil P. C., and the Hindu law? The answer is No. (4) The answer to question No. 4 is Yes.

One matter has been brought to our attention which is not referred to us and which therefore the Courts at Ajmere can if they please, disregard entirely. The legal result of the suit obviously would be applying the principles of Common law if Mt. Chun Kuar were sui juris and she and her husband were separate, and parties to separate contracts, bound by their own rights and obligations in respect of their respective estates, that the suit in regard to the 400 gold mohurs should be decreed against the heir of Mt. Chun Kuar in respect of her estate in their hands, and the suit as regards the manuscripts and the pictures should be decreed against the heir of Sobhag Mul in respect of the estate in his hands. But it is needless to point out to the Courts at Ajmere that if the family is in fact a joint Hindu family and the Musammat had no separate estate of her own, the question does not arise.

Our attention has been drawn to the form of the decree which seems consistent only with the family having been either found as a fact or treated as a common ground between the parties, as being a joint family in which case the decree, no doubt, is right. If on the other hand, this is not the case the Courts at Ajmere if they choose to pay any attention to this observation, have complete powers under S. 153, Civil P. C., to amend the decree in accordance with the rights of the parties.

The costs of this reference must abide the result of the suit. We fix the fees in this Court at the sum of Rs. 550 for

the respondents and at Rs. 400 for the appellants.

V.B./R.K. *Order accordingly.*

A. I. R. 1919 Allahabad 104

MEARS, C. J. AND BANERJI, J.
Mahomed Hashim—Appellant.

v.

Ram Sahai and others—Respondents.

Privy Council Appeal No. 31 of 1919,
Decided on 28th November 1919, for leave
to appeal to His Majesty in Council.

(a) Civil P. C. (1908), Ss. 109 and 110—
Suit in respect of property worth more than
Rs. 10,000—Appeal by one defendant in res-
pect of his liability of less than Rs. 10,000—
Case held not covered by S. 110.

Where the original value of a suit exceeds Rs. 10,000, but in an appeal by one of the defendants to the High Court the contest is in respect of his liability for a sum less than Rs. 10,000, the case for the purposes of an appeal to His Majesty in Council does not come within the purview of para. 1, S. 110, nor does it fall under para. 2 of that section as involving any question regarding property of the value of Rs. 10,000 or upwards.

[P 104 C 2]

(b) Civil P. C. (5 of 1908), Ss. 109 and 110—
Question whether omission to implead one
plaintiff is fatal to appeal does not justify
certificate under S. 109.

The question whether the omission to implead one of the plaintiffs in an appeal to the High Court is fatal to the appeal is not a question of law of general importance involved in the appeal to justify a certificate that the case is otherwise a fit one for appeal to His Majesty in Council.

[P 104 C 2]

S. M. Sulaiman—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—This is an application for leave to appeal to His Majesty in Council. The suit was one for foreclosure of two mortgages, under which a sum of Rupees 14,493 was alleged to be due to the plaintiffs. The defendant who now seeks to appeal to His Majesty in Council, is a purchaser of a portion of the mortgaged property and he contested the claim. The Court of first instance decreed the claim. The present applicant preferred an appeal to this Court and in that appeal he raised the question of his liability in respect of Rs. 3,800 out of the total amount held by the Court below to be due under the two mortgages. In this Court he omitted to implead as respondent one of the persons who was a plaintiff in the suit. On the ground of this omission the learned Judges who heard the appeal in this Court dismissed the appeal. The appellant now applies for leave to appeal to His Majesty in Council against the decree dismissing his appeal. The value of the subject-matter of the suit was undoubt-

edly upwards of Rs. 10,000, but the value of the proposed appeal is only Rs. 3,800. Therefore the case does not come within the purview of para. 1, S. 110. It is however urged that the decree or final order in this case involves directly or indirectly some claim or question to or respecting property of the value of upwards of Rs. 10,000, as mentioned in Cl. 2 of the section.

We do not think that the case falls under Cl. 2, S. 110. The appeal does not involve any question regarding property of the value of Rs. 10,000 or upwards. The sum of Rs. 3,800, which the appellant seeks to be deducted out of the amount declared by the Court of first instance to be due upon the mortgages, consisted of a principal sum of Rs. 1,125 which was alleged to have been paid to the mortgagee and two other sums in regard to which it was urged that the mortgage was without legal necessity. That was not a question affecting directly or indirectly property of the value of Rupees 10,000 and upwards. The first ground upon which the applicant contends that the case fulfils the requirements of S. 110 is in our opinion untenable. It was next contended that the case was otherwise a fit one for appeal to His Majesty in Council and that a question of law of general importance was involved in the appeal. We do not agree with this contention also. The question of law which is raised by the applicant is whether the omission to implead in the appeal one of the plaintiffs was fatal to the appeal. It is said that that plaintiff was represented by the manager of the family to which he belonged and that therefore the omission of his name from the array of respondents did not affect the array of parties in the appeal. This question does not appear to have been raised before the Bench which heard the appeal, and we do not find from the record any suggestion that any of the other respondents was the head and manager of the family to which the minor plaintiff Bansidhar (who was not made a respondent to the appeal) belonged. Under the circumstances, we think that this is not a case which we can certify to be otherwise a fit one for appeal to His Majesty in Council. We therefore reject the application with costs including fees on the higher scale.

V.B./R.K.

Application rejected.

*** * A. I. R. 1919 Allahabad 105
Full Bench**

RICHARDS, C. J., RAFIQUE AND
LINDSAY, JJ.

Chhaggan Lal — Defendant — Appel-
lant.

v.

Mahamed Hussain Khan and others—
Plaintiffs and Defendants — Respondents.

Second Appeal No. 1569 of 1915, Deci-
ded on 24th February 1919, from decree
of Sub-Judge, Meerut, D/- 6th July
1915.

(a) Mortgage—Decree—Mortgage merging
in decree—Effect of, stated.

Where a mortgage merges in a decree in favour
of the mortgagee, his remedy is no longer that of
a mortgagee, but is that of a person who holds a
decree under which he is entitled to bring certain
property to sale, and if he wishes to retain this
position he should execute the decree, and not
take a fresh mortgage the consideration for
which is the decree. [P 107 C 1]

* * (b) Mortgage—Priority — Prior mort-
gagee obtaining decree on mortgage and
subsequently taking fresh mortgage—Part
consideration decretal amounts—He cannot
claim priority over intermediate mortgagees
— Transfer of Property Act, Ss. 75 and
101.

A prior mortgagee who obtains a decree upon
his mortgage and after that decree is made abso-
lute takes a fresh mortgage, a part consideration
of which is the decretal amount, it being dis-
tinctly stated that the decree is discharged, can-
not claim priority over intermediate mortgagees.
[P 108 C 2]

(c) Mortgage — Person paying off prior in-
cumbrance without deed of transfer has
no higher position than prior encumbrancer.

A person who pays off a prior incumbrance
without taking a deed of transfer is in no higher
position than the prior incumbrancer.
[P 107 C 1]

* * (d) Mortgage—Decree—Decree extin-
guishes mortgage security as well mortgagor's
right to redeem — Mortgagee's remedy is
under decree.

Where a decree is obtained upon a mortgage,
the decree, upon the making of an order absolute,
extinguishes the mortgage security as well as
the defendant's right to redeem, by substituting
for that security a right to sell conferred by the
decree, and thenceforward the mortgagee's remedy
is under the decree. [P 107 C 1]

Girdhari Lal Agarwala—for Appel-
lant.

*Hameed Ullah and Sham Nath Mush-
ram*—for Respondents.

Richards, C. J.—The facts connected
with this appeal are stated in my judg-
ment delivered on 1st August 1916 and
it is unnecessary to repeat them. It may
however be well to summarise the result
of the findings of the Court below upon
the issues referred in conjunction with the
statements made by the learned counsel

upon each side as to the mortgages. It
appears that the principal property mort-
gaged in the mortgage of 11th July 1893,
was a 1/3rd share in a certain khata.
The property hypothecated in the mort-
gage of 29th November 1893 was practi-
cally the same. In the mortgage of 21st
August 1894 the same share in this
khata was mortgaged, and there was some
additional property. In the mortgage of
17th May 1904, 1/6th of this khata (in-
stead of 1/3rd) is mortgaged and some
additional property as well. The plain-
tiffs obtained a decree on foot of the
mortgage of 29th November 1893, where-
by they were ordered to redeem the mort-
gage of 11th July 1893 when they would
be entitled to sell the property for the
aggregate amount of these two mortgages.
That decree duly was made absolute and
was put into execution and the greater
part of the mortgage debt was realised,
leaving only a balance of Rs. 156. The
property was however never brought to
sale. The mortgage, on foot of which
the present suit is based, is the mortgage
of 17th May 1904. The consideration
for that mortgage was the Rs. 156 which
still remained unpaid on foot of the
mortgage decree which the plaintiffs ob-
tained on their previous mortgage plus
an additional sum of Rs. 94.

The question which the plaintiff
sought to have decided in his favour as
against the appellant here was that he
should obtain priority in respect of this
Rs. 156 against the defendant-appellant
and that he should be at liberty to sell a
1/4th share which the appellant had
purchased to realise this Rs. 156 and in-
terest. The circumstances under which
the 1/4th share was purchased are as
follows: Amolak (the father of the ap-
pellant) obtained a decree on foot of the
mortgage of 21st August 1894. The pro-
perty was put up to sale and the defen-
dant purchased 1/4th of the khata
(No. 27), being the khata which is com-
mon to all four mortgages. Reading the
mortgage of 17th May 1904 it is abund-
antly clear that it was intended that this
mortgage should discharge and be in
satisfaction of the decree. On the face
of it it is stated that the decree is dis-
charged. On a previous occasion, when
the case was before the Court, it was
stated that the decree had been certified
as discharged. Whether this was actu-
ally done or not it is clear that in 1904

after the mortgage was executed, it was never intended that the decree should be further executed and if the decree was not certified as satisfied it should have been so certified. If it was necessary I should hold that under the circumstances of the present case no presumption arises that the plaintiff intended to keep alive either the mortgage of 11th July 1893 or the mortgage of 29th November 1893. I think there is express evidence that the intention was that these mortgages and the decree were to be treated as discharged. It must be admitted that if the plaintiff's claim in the present suit is to date from 17th May 1904, when he took the new mortgage, the appellant has priority over him because the plaintiff's purchase and possession must be attributed to the mortgage of 21st August 1894.

It is said however that as against the defendant-appellant the plaintiff has priority to the extent of Rs. 156 and interest as of July and November 1893. This contention is based upon the presumption that because it was for the interest of the plaintiffs to keep alive the securities of 1893 it must be presumed they intended to do so and in fact did so. I have already stated my opinion as to this matter. It seems to me however that in any event the two mortgages of 1893 merged in the decree with the plaintiff obtained on foot of the mortgage of 29th November 1893 and that those mortgages were discharged and extinguished. If the plaintiff bases his claim on either of these mortgages, he is at once met with a number of defences. In the first place it can be said that a suit was brought on foot of these mortgages and a decree obtained for the sale of the mortgaged property and that a second decree cannot be made.

In the next place, if the plaintiffs were suing on foot of one or the other or both these mortgages, the suit would be barred by limitation. If the plaintiff bases his claim on the fact that he is a decree-holder, the answer is, that the present proceeding is not an application to execute a decree but a suit asking for a decree directing the sale of the property. In the present case it happens that the plaintiff was the decree-holder who obtained the mortgage decree on the mortgage of November 1893, but if he happened to be a third party who had

paid off prior encumbrance, I do not think that a third party has any higher right than the original mortgagee would have had. I may quote here the words of Warrington, J., in the case of *Ellis v. Ellis* (1):

"The plaintiffs then contend that George Ellis, having paid off the debt for the benefit of the estate, was entitled to stand in the place of the creditor, and that he transferred that right to James Ellis, who actually found the money. But, granting that such would be the right of George Ellis and that the plaintiffs could assert that right by subrogation, any claim founded on it would be barred by the Statute of Limitations. The debt is of course long since barred, and all claims under the original security are now barred also, for in this aspect of the case the payment of the interest was made by a stranger, and was not such a payment as would prevent the statute from running."

It is said that because the plaintiffs omitted to make the appellant a defendant to their suit on their mortgage, they can bring a second suit on their mortgage as against the appellant. I think this very doubtful. But even if they could the present suit is based on the mortgage of 1904, not on the mortgage of 1893. In my previous judgment I have pointed out the distinction between a plaintiff seeking to sell property simply by reason of his having discharged a prior encumbrance and a defendant defending his possession or position in a suit brought against him. The very metaphor of the shield indicates the distinction. A man does not attack with a shield, he defends with it. Reliance was placed on behalf of the respondents on certain remarks of Mookerjee, J., in the case of *Dhakeswar Prosad Singh v. Harihar Prosad Narain Singh* (2). At p. 110 (of 21 C. L. J.) of the report that very learned Judge says:

"This principle is obviously applicable to the case before us, although the mortgage debt was satisfied by a purchaser of a portion of the mortgaged property after a decree had been obtained on the mortgage. The purchaser who redeemed the mortgage was, for the purposes of the rule, in the same position as if he were one of two joint mortgagors. The fact that a decree had been obtained on the mortgage was also immaterial, because a decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree and the judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment-creditor."

The facts of the case in which this judgment was delivered were different

(1) [1905] 1 Ch. 613.

(2) [1915] 27 I. C. 780.

from the facts of the present case; but it seems to me that if it be taken that the mortgages of 1893 merged in the decree obtained by the plaintiff, then the plaintiff's remedy was no longer that of a mortgagee but that of a person who held a decree under which he was entitled to bring certain property to sale. If he wished to retain this position, he should not have taken a fresh mortgage the consideration for which was the decree—he should have executed his decree. It may be that where a person pays off a prior encumbrance before a decree has been made on foot of it and either expressly or by implication retains the benefit of that prior encumbrance, he can be treated as if he were the assignee of the prior encumbrance; and if the prior encumbrance is not barred by limitation he may be able to bring a suit just as the transferee of the prior encumbrance might have done.

But it seems to me that the person paying off a prior encumbrance without taking deed of transfer can be in no higher position than the prior encumbrancer would have been. If a decree has been obtained on foot of the prior encumbrance, then it seems to me that the prior encumbrance as such is discharged and from thenceforward the remedy is under the decree. I have pointed out that the question between the parties to this appeal was whether or not the plaintiff could insist on priority against the appellant. The plaintiffs have made no claim to redeem the appellant. I think therefore that the decree of the Court of first instance should be restored.

Rafique, J.—I am also of opinion that this appeal should prevail. It appears that originally Mohar Singh (the father of Mamraj and the grandfather of Hoshier, defendants 3 and 4 in the first Court) executed a mortgage on 11th July 1893 in favour of Chhaggan Khan (the father of Muhammad Hussain Khan) and Masitullah. Muhammad Hussain Khan and Masitullah are the plaintiffs in the present suit. By way of security he (Mohar Singh) hypothecated a khata. About four months after he executed another hypothecation bond in favour of Chajju Khan in respect of the same khata. On 21st August 1894 he gave a third mortgage deed to Amolak (the father of the contesting defendant Chhaggan Lal). In the deed of 1894 the

same property that was mortgaged in the deeds of 1893 was hypothecated together with some other property which need not be mentioned here. In 1898 Muhammad Hussain Khan (one of the plaintiffs in the present suit) sued on the mortgages of 1893 and obtained a decree for sale against both Mohar Singh and his son Mamraj. The decretal amount not having been paid an order absolute was made on 13th March 1899. Amolak subsequent to these proceedings brought a suit on the basis of his mortgage of 1894. Muhammad Hussain alleges that he applied to be brought on the record as a party but his application was rejected. The case proceeded to trial and a decree was passed in favour of Amolak for the sale of the hypothecated property. In execution of the decree part of the property was sold and purchased by Amolak, namely, one-fourth of khata No. 27, that is, the property which was hypothecated in both the bonds of 1893 and 1894. On 17th May 1904 Mamraj executed a further deed of mortgage in favour of Muhammad Hussain Khan for Rs. 250. Out of the sum of Rs. 250 Rs. 156 were credited towards the decree of 1898 in full discharge as part of the decree had already been paid up. In the bond of 1904 a portion of khata No. 27 was mortgaged by way of security together with property in other khatas.

On 2nd January 1904 the suit out of which this appeal has arisen was brought by Muhammad Hussain Khan and Masitullah Khan against Chhaggan Lal (the son of Amolak) and against Mamraj and his minor son Hoshier for the recovery of the money due on the bond of 17th May 1904 by sale of the property hypothecated in the said bond. Chhaggan Lal resisted the claim on various pleas, one of which was that the property which his father had purchased in execution of his decree was not liable to sale under the decree if passed in favour of the plaintiffs on the bond of 17th May 1904. The plaintiffs in rejoinder contended that as part of the consideration of the bond of 17th May 1904 was the money due on the decree of 1898, and the latter decree was on the basis of the bonds of 1893, they (the plaintiffs) had priority over Amolak's mortgage of 1894. The Court of first instance accepted the contention for the defence and disallowed

the claim of the plaintiffs for priority as against the defendant appellant. On appeal the learned Subordinate Judge disagreed with the first Court and following a ruling of this Court decreed the claim of the plaintiffs against the property that had been purchased by Amolak in execution of his decree. In second appeal to this Court the contention on behalf of Amolak's son is that the plaintiffs had no priority over him inasmuch as their mortgages of 1893 had merged into the decree of 1898. On the other hand the contention for the plaintiffs-respondents is that where a prior mortgagee obtains a decree upon his prior mortgage and in lieu of the amount of that decree he obtains a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit and he can hold it up as a shield against the puisne mortgagee whose mortgage is of a date subsequent to that of the prior mortgage, and if it is to the benefit of the prior mortgagee to keep alive that mortgage, it would be presumed that he kept it alive.

In support of this contention several cases have been cited by the learned counsel for the plaintiffs-respondents. The principal case on which reliance is placed is a case of this Court reported as *Kanhaiya Lal v. Chhidhu Singh* (3). It is unnecessary to refer to the other cases cited on behalf of the respondents, as there is no doubt that there is authority in support of the contention. But I think as far as this case is concerned none of those cases is applicable. The facts of this case are quite different. If it be conceded that where a prior mortgagee obtains a decree upon his prior mortgage and in lieu of the decretal amount gets a subsequent mortgage of the same property from the mortgagor, the prior mortgage enures to his benefit and he can enforce it against the property in preference to the subsequent mortgagee, it has still to be seen whether in the present case there was an intention on the part of Chajju Khan or Mohammad Hussain Khan to keep alive the prior mortgage, or under the circumstances of the present case we can presume such intention. On reference to the deed of 17th May 1904 it is clear that there was no intention to keep the mortgages of 1893, or the decree of 1898, alive for the benefit of the mortgagee. In fact

the wording is such that a contrary intention is expressed. It is distinctly stated there that the mortgage was taken partly in satisfaction of the decree of 1898 which had been put into execution, upon which payments had been made and which after the execution of the mortgage had been certified as discharged. In the deed of 17th May 1904 only a portion of the property that was mortgaged in the deeds of 1893 was taken by way of security (and other property of higher value was also taken by way of security). I would also note here that this case is to be governed by the provisions of Act 4 of 1882.

Under S. 89 of the said Act when the order absolute is made, the right to redeem and the security of the mortgage are both extinguished. I am aware of the fact that in spite of the language of S. 89 the Courts have allowed redemption, and in the cases cited on behalf of the plaintiffs-respondents the mortgage security is said not to have been extinguished. With due deference to the learned Judges I would say that the language of the section is quite clear and distinct, and the mortgage security is extinguished when after a decree is passed on a mortgage an order absolute is made. The mortgagee instead of having the mortgage as a security on getting a decree has his right of sale under the decree. Their Lordships of the Privy Council in the case of *Het Ram v. Shadi Ram* (4) say : "The section then provides that the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. After this expression of opinion it can hardly be contended that if a proper mortgagee obtains a decree and that decree is made absolute and then he takes a fresh mortgage, he can still fall back upon his first mortgage as against intermediate mortgagees. I would therefore hold that the plaintiffs-respondents have no priority over the defendant-appellant in respect

(4) A. I. R. 1918 P. C. 34=40 All. 407=45 I. A. 130=45 I. C. 598 (P.C.).

(3) [1910] 7 I. C. 468.

of the property purchased by his father. I would therefore allow the appeal.

Lindsay, J.—I agree that this appeal should be allowed. The suit out of which it has arisen has been brought by the plaintiffs-respondents for the purpose of recovering a debt secured by a mortgage executed in their favour in the year 1904. They are seeking to recover the mortgage money out of property which is in the possession of the defendant-appellant, under a title which runs back as far as the year 1894. It is admitted that the appellant's father got a mortgage of the property in 1894, and afterwards brought a suit for sale upon the mortgage and purchased the property himself. It is plain therefore that the mortgage upon which the present suit has been brought is posterior in date to the date of the mortgage under which the defendant-appellant has acquired his title. The case for the plaintiffs however is that by reason of certain previous mortgages with which they were concerned they have acquired priority over the defendant-appellant in respect of a sum of Rs. 156 which formed part of the consideration of the mortgage now in suit. Reference has already been made in the judgments of my learned colleagues to the history of the litigation prior to the year 1904. In the mortgage now in suit a reference is made to the suits brought by the present plaintiffs-respondents in respect of the two mortgages of 1893. It is stated in the document that a preliminary decree was obtained by the present plaintiffs in the year 1898 and that an order absolute was passed in their favour in March 1899. It may therefore be conceded that just before the mortgage of 1904 the plaintiffs-respondents had security for previous mortgage debts. Whether or not that previous security was kept alive after the document of 1904 was written is a question of the intention of the parties. Where there is no evidence either way it is settled law that the presumption is that the parties act for their own benefit; and so it may be said in the present case that inasmuch as a sum of Rs. 156 was still owing to the plaintiffs-respondents under the decree obtained by them in the year 1899, it was to their benefit to keep the decree alive when they took the mortgage of 1904. On the other hand the presumption arising out of the assumed benefit may be overturned by

direct evidence, and I agree with my colleagues that in the document of 1904 there is language which precludes the notion that it was the intention of the plaintiffs-respondents to keep the previous security alive. I fail to understand how in the face of the language which has been used in this document, where we have an express recital to the effect that the decree had been fully paid off, it is possible for the plaintiffs-respondents here to contend that it was in their minds at the time that the previous security should be maintained.

Even if it could be assumed in favour of the plaintiffs that there was any such intention on their part, the question remains, what was the prior security upon which they were entitled to rely. The nature of this security is determined by the fact that an order absolute under S. 89, T. P. Act was made in their favour in the year 1899. As my learned colleague, Rafique, J., has pointed out, their Lordships of the Privy Council in the case to which he has referred have defined the nature of the security which is left to a mortgagee after he has obtained the order absolute described in S. 89, T. P. Act. The right of the mortgagee under the security is extinguished and there is substituted therefor a right to a sale conferred by the decree. In other words, the only right which is left to the mortgagee after such an order has been passed is the right to execute the decree. This being the nature of the security which was left to the plaintiffs-respondents after the order absolute was passed in their favour in 1899, if they now seek to maintain that that security is alive, then the only remedy for them is to take out execution of the decree. Instead of doing so they have resorted to the present suit which it was not competent for them to do. Mr. Hameedullah, who appears for the plaintiffs-respondents, has pointed out that unfortunately it would be impossible for his clients to take out execution of the decree of 1889 against the defendant-appellant, on the ground that neither he nor his father, was a party to the decree obtained by the plaintiffs on the mortgage of 1893. All that need be said in this connexion is that if such is the case the plaintiffs have only themselves to blame. Under S. 85, T. P. Act they ought to have made Amolak (the subsequent mortgagee) a party to the suit

which they brought on the mortgages and if they omitted to do so, they cannot now correct their error by trying to go behind the decree and instituting a suit upon a mortgage which has become extinguished. I think this is all that is necessary for me to say with regard to the question of law which is before us. I would allow the appeal set aside the decree of the lower appellate Court and restore the decree of the Court of first instance.

By the Court.—The order of the Court is that the appeal is allowed, the decree of the lower appellate Court set aside and the decree of the Court of first instance restored with costs in all Courts. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 110

LINDSAY, J.

Jalpa Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 15 of 1919, Decided on 21st February 1919, from order of Sess. Judge, Allahabad, D/- 2nd January 1919.

Evidence Act (1872), S. 6—Statement by one accused to police is not admissible against co-accused either as confession or as part of *res gestae*.

One *P* came to a police station and handed in a written report in which there were allegations that certain persons had committed the offence of riot, one of them being a zamindar named *M*. The report was read out to *P* and as soon as he heard it, he informed the police that *M* was not present at the riot and that he had made no charge against him. He stated that the report was written by one *J*. Subsequently *M* prosecuted *J* and *P* for an offence under S. 211 of the Penal Code.

Held: that the statement made by *P* to the police was not admissible against *J* either as part of a confession or as a part of the transaction under investigation under S. 6. [P 111 C 1,2]

Peary Lal Banerji—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This is an application on behalf of one Jalpa Prasad, who was convicted in the Court of a Magistrate of an offence under S. 211, I. P. C. The conviction has been maintained in appeal by the Sessions Judge. Two questions have been raised on behalf of the applicant. It is contended in the first place that there is no evidence on the record to support the finding that the accused is the person who sent a certain written report, Ex. A, to the Thana in

which was contained an allegation against one Moinuddin that he had been concerned in a case of riot. The second question is whether or not the prosecution was maintainable in the absence of sanction with reference to the provisions of S. 195, Criminal P. C. The facts alleged for the prosecution were as follows: On 13th of July 1918 a man named Pitai came to the police station at serai Mamrez and handed in a written report, in which there were allegations that certain persons had committed the offence of riot, one of them being a Zamindar named Moinuddin. The written report was read out to Pitai by the police officer to whom it was brought and as he heard it Pitai informed the police that Moinuddin was not present at the riot and he, Pitai, was not responsible for making any charge against Moinuddin. The police made an inquiry and sent in what is called *naksha B*; in other words they found that there was no sufficient evidence forthcoming to justify the prosecution of the case.

When Pitai was examined by the police at the time he brought the written report, he stated that the report had been written by Jalpa Prasad, the present accused. After the police had refused to send the case up for trial, Moinuddin brought a complaint under S. 211 against both Jalpa Prasad and Pitai. Pitai was acquitted by the Magistrate and Jalpa Prasad has been convicted. Jalpa Prasad's story was that he had not written the report which Pitai brought to the police station. The first and principal question for decision therefore was a question of fact namely whether or not Jalpa Prasad was the writer of this document. The learned Judge in his judgment has discussed the evidence at length, and to put the matter shortly he classifies the evidence on this issue under three heads:

(1) The statement of certain witnesses who professed to have been present or close by at the time Jalpa Prasad wrote the document. This evidence has been rejected by the learned Judge as altogether unreliable. (2) Evidence in the nature of opinion to prove that the document Ex. A is in the handwriting of Jalpa Prasad, and (3) the statement which Pitai made to the police at the Thana after the written report had been

read out to him. With regard to this latter statement the judgment of the Court below seems to me to be inconsistent. In two places in the judgment the learned Judge states that the statement which was made to the police officer at the Thana by Pitai was not admissible in evidence against Jalpa Prasad, his co-accused. On the other hand he states in another place that the statement cannot be excluded from evidence because in the opinion of the learned Judge it was admissible as part of what the learned Judge calls the "res gestae"

It is apparent that this statement made by Pitai at the police station was not admissible on the ground that Pitai was not a witness in the case, but was, as has been said, a co-accused who was under trial at the same time as Jalpa Prasad. It is not pretended that the statement referred to was made in the course of any confession which might under the provisions of the Evidence Act be taken into consideration against his co-accused Jalpa Prasad. As for the learned Judge's opinion, that the statement was admissible as part of the *res gestae*, I am unable to agree with him. It is unfortunate that an expression so ambiguous as *res gestae* was used in discussing this part of the case. If the statement made by Pitai to the police was admissible at all, it could only have been admissible under S. 6, Evidence Act, which lays down that

"facts which, though not in issue are so connected with the facts in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places."

This provision of the Evidence Act enacts the law which is usually laid down in England in these terms, namely, that acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue, are admissible for or against either party as forming part of the *res gestae*. It is difficult to understand how it can be said that the statement made by Pitai at the police station forms part of the transaction which was under investigation in this case, namely, the sending of a false report by Jalpa Prasad to the Thana. It is not suggested that Jalpa Prasad and Pitai were acting in collusion or were in any way conspiring together for the purpose of bringing a false charge against Moinuddin. Had this been the case, it might

perhaps have been said that the statement made by Pitai, with reference to an act which was done in pursuance of the common intention, was relevant as constituting a part of the transaction under investigation. That however is not the case, for all that the evidence shows is that as soon as Pitai came to know that a charge was being made against Moinuddin he disclaimed all intention of having made any statement imputing any part in the riot to Moinuddin. It is quite clear to me therefore that the statement which Pitai made at the Thana was in no way part of the transaction under investigation and as such was not admissible under S. 6, Evidence Act.

There only remains to discuss the other class of evidence in the case, namely, the evidence of identity of the handwriting. It appears that when the accused was under trial in the Magistrate's Court he called upon the accused to write out in Court the text of the report which was brought by Pitai to the Thana. Whether or not the accused tried to disguise his writing when he was called upon by the Court is a matter of uncertainty, but at any rate it seems clear to me that there is not the faintest resemblance between the writing so produced and the writing which is to be found in the report Ex. A, and it would be quite impossible for any Court to say on comparison of these two writings that the writing in Ex. A is the writing of Jalpa Prasad. Three rent receipts were produced in Court which apparently were considered to be in the writing of the accused. I can find no direct proof on the record that they were as a matter of fact written by Jalpa Prasad, but assuming that they were it is to be observed that here again there is not the least resemblance between the two writings. There is indeed the statement of a witness, Ghulam Husain, who declares his opinion that the writing on Ex. A is the writing of Jalpa Prasad. His statement on this point reads as follows:

"I saw his (Jalpa Prasad's) handwriting thousands of times. I also saw him in the act of writing. I can identify his handwriting. Ex. A is in the handwriting of Jalpa Prasad. More than 20 years ago, in an arrears for rent suit of Tahsil Handia, I identified a receipt written by Jalpa Prasad."

In cross-examination the witness had to admit that he and Jalpa Prasad had not been living or working together for

20 years. He further stated that Ex. A was in the ordinary writing of Jalpa Prasad written with a stout pen and that the writing was of the same character as it was 20 years ago. This evidence, in my opinion, is of no value whatsoever and does not assist the prosecution for the purpose of establishing that Jalpa Prasad was responsible for the writing of the report. I must hold therefore in favour of the applicant that the evidence fails to establish that he is the person who wrote the report which forms the subject-matter of this complaint. This being so, it is unnecessary for me to deal with the other question, namely, whether or not the prosecution was maintainable without an order passed under S. 195, Criminal P. C. I allow the application, set aside the conviction and sentence and direct that the accused be released from the bail which has been granted to him by this Court.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 112 (1)

RICHARDS, C. J. AND BANERJI, J.

Bhola Nath Tewari and others—Defendants—Appellants.

v.

Suraj Bali Rai and others—Plaintiffs—Respondents.

Second Appeal No. 1797 of 1917, Decided on 30th November 1918 from decree of Dist. Judge, Gorakhpur.

Agra Tenancy Act (1901), S. 11—Landlord can confer occupancy right on tenant.

There is nothing illegal in a landlord agreeing that his tenant should have the rights of an occupancy tenant and, amongst others, the right not to be ejected so long as he pays his rent and observes the conditions of his tenancy.

[P 112 C 2]

Haribans Sahai—for Appellants.

Pearey Lal Banerji—for Respondents.

Judgment.—This appeal arises out of a suit for ejectment brought in the Revenue Court. The plaintiff alleged that the defendant was not an occupancy tenant and therefore liable to ejectment. The Court of first instance dismissed the suit. The lower appellate Court granted a decree. There is a long history attached to the holding. It would appear that at one time at any rate the holding was the holding of an occupancy tenant and the defendant originally got into possession by virtue of a usufructuary mortgage created before the Tenancy Act came into operation. However this may

be, an agreement arrived at upon a compromise between the parties in a previous litigation was put in evidence. Under that agreement the plaintiff's predecessor-in-title agreed that the defendant should be considered an occupancy tenant and that he should not be ejected. It has been properly conceded here that the present plaintiff is in no better position than his vendor would have been who entered into the agreement with the defendant. The learned District Judge considered that the zamindar could not create an occupancy tenancy and that length of occupation as prescribed in the Tenancy Act alone creates occupancy right. This perhaps may be correct, but it seems to us there is nothing illegal in the landlord agreeing that his tenant should have the rights of an occupancy tenant and amongst others the right not to be ejected so long as he paid his rent and observed the conditions of his tenancy. We think that under these circumstances the plaintiff was not entitled to eject the defendant. It is therefore unnecessary for us to consider the other questions which arise, namely whether the plaintiff was entitled to sue without joining the other cosharers in the khata. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1919 Allahabad 112 (2)

PIGGOTT AND WALSH, JJ.

Mt. Shabban Bibi—Plaintiff—Appellant.

v.

Khalik Shah and another—Defendants—Respondents.

First Appeal No. 62 of 1916, Decided on 28th May 1918, from decision of Sub. Judge, Azamgarh, D/- 29th September 1915.

Mahomedan Law—Marriage—Dancing girl having illegitimate connexion with her employee setting up valid marriage—Marriage cannot be inferred from mere circumstantial evidence or evidence of long continued exclusive cohabitation.

Where a person in the position of a dancing girl of questionable antecedents, whose connexion with her employee was illegitimate from its inception, sets up a valid marriage at a particular time and place, such marriage cannot be inferred from mere circumstantial evidence, nor from evidence of long-continued and exclusive cohabitation on the ostensible footing of a lawful wife.

Piggott, J.—In this case the two defendants are the brother and nephew of the late Raja Muhammad Salamat Khan of Azamgarh who died on 3rd April 1912. He had made an arrangement in his lifetime intended to secure the succession of his nephew, the younger defendant, to his title and the bulk of his estates: this arrangement seems to have been given effect to, with the sanction of Government, as regards the title. The plaintiff, Mt. Shabban Bibi, claims to be the sole surviving widow of the late Raja; she brings this suit to recover her dower debt stated at Rs. 40,000 and claims at the same time subsidiary relief by way of declaration as to the property from which this dower-debt is recoverable. She reserves her claim to possession of one-fourth of the estate, as an heir of the deceased under the Mahomedan law, for a separate litigation. The defendants replied that the plaintiff was never married to Raja Muhammad Salamat Khan, and consequently no dower was ever fixed for her, or could be due to her; she was merely a dancing girl who had secured the favour of the late Raja and had been "kept in a separate house" by him. They pleaded further that, as long ago as 22nd February 1886, Raja Muhammad Salamat Khan had made full provision for the plaintiff by executing in her favour a deed of gift conveying to her his proprietary rights in village Salamatgarh, of which the plaintiff was still in possession and enjoyment. At the same time, the Raja had taken the precaution of obtaining from the plaintiff a deed under which the latter formally relinquished all claims against the estate of Raja Muhammad Salamat Khan. With respect to this deed of relinquishment, the plaintiff's rejoinder was that she had never executed it, or at any rate had never set her name to it with any knowledge or understanding of its contents. It has also been contended, with reference to the terms of this document, that it has in any case no bearing on the claim for dower debt, whatever might be its effect on a claim to a share in the inheritance. The learned Subordinate Judge framed a number of issues, the majority of which he did not find it necessary to decide. On the main question in dispute he has held that

"it has not been proved that the plaintiff is the

married wife of the deceased Raja Muhammad Salamat Khan."

With regard to the deed of relinquishment of 22nd February 1886, he has held that it would not, on its terms, operate to bar a suit for dower supposing, of course, that the plaintiff were a lawfully married wife and that a dower had been fixed for her and remained unpaid. He finds however that the plaintiff did execute this document "after hearing and understanding it," but declines to determine a technical objection as to the validity of its registration. He holds that the plaintiff would not, in any event, be entitled to obtain in this suit a declaration as to the property from which her dower-debt, if proved, could be realized.

In her memorandum of appeal to this Court the plaintiff challenges all the findings of the Court below which are against her; but of course, the main questions, before us are whether the plaintiff was or was not married to Raja Muhammad Salamat Khan and if so what was the amount of her dower-debt. The plaintiff attempted to prove her case on both these points by direct evidence. She was herself examined, on commission, and she caused to be examined, also on commission, two witnesses, Nawab Shujayat Ali Khan and Sayyid Izharuddin Ahmad, residents of Patna; these depose to a marriage at Patna in or about the year 1862 A. D. between the plaintiff and Raja Muhammad Salamat Khan at which a sum of Rs. 40,000 was fixed as the dower-debt of the former. The plaintiff also relies on a mass of circumstantial evidence as proving cohabitation between herself and the late Raja, ostensibly on the footing of lawful marriage; she also undertakes in this connexion to prove acknowledgments on the part of the said Raja, both express and by implication, of her status as his wife. The defendants on their side could scarcely be expected to produce much in the way of direct evidence in proof of their negation of the marriage; they impugned the veracity of the plaintiff's witnesses and suggested explanations of the circumstantial evidence relied on by the latter. They also put forward certain circumstances as supporting their contention that the position of the plaintiff in the late Raja's household was rather that of a favoured mistress or concubine than of a wedded wife. On one point however

and one of considerable importance they joined issue with the plaintiff in the most direct fashion and produced a body of evidence directly contradicting that of the plaintiff and of her witnesses. The plaintiff's account of herself is that she is the daughter of one Sadiq Husain Khan, originally a resident of Delhi, who removed (at some period not very clearly specified) to the city of Patna. She was married at about the age of eighteen to one Abad Husain, a Saiyid by race, and lived with him for a little more than two years, when he died, leaving her with an infant son, who received the name of Nanhe Khan. Some three or four years after the death of her first husband, her parents arranged for her second marriage with Raja Muhammed Salamat Khan. This took place at Patna, but the Raja took her home with him to his ancestral Fort at Azamgarh, introduced her there as his honourable wife and she lived with him as such for very nearly fifty years up to the time of the Raja's death. She makes a particular point of the kindly treatment of her son Nanhe Khan by his step-father, Raja Muhammad Salamat Khan and of the affection evinced by the latter for Afzal Khan, son of the said Nanhe Khan. On the other hand the case for the defendants is that the plaintiff is the daughter of a disreputable woman of the name of Chhuttan, who was originally a Brahmini, but was converted to Muhammadanism, adopted the profession of a prostitute and lived for many years in Azamgarh in the keeping of one Nanak Bakhsh (a Hindu, apparently a Khatri by caste) to whom she bore a number of children, including the plaintiff.

The latter first attracted the notice of Raja Muhammad Salamat Khan when she was appearing in public as a dancing girl and was presumably also following the less reputable branch of her mother's profession. There was an illicit connexion between the plaintiff and the Raja which continued for some years before the Raja took this favoured mistress to live with him in his Fort. The conflict of evidence on this point has a twofold importance. The witnesses Shujayat Ali Khan and Izharuddin Ahmad have committed themselves to the support of the plaintiff's own account of herself, her family and her antecedents; if on these matters they have

deliberately elected to give evidence which is false in fact, which they probably know to be false and which they most certainly do not know to be true, the Court must necessarily find it very difficult to accept their testimony as sufficient to prove that the plaintiff's dower debt really amounted to Rupees 40,000. In the second plea, much of the circumstantial evidence relied upon by the plaintiff takes on different colours and is susceptible of divergent interpretation according as the Court is satisfied that the plaintiff first met Raja Muhammad Salamat Khan as a young widow of a respectable family and unblemished antecedents or as a dancing girl and the illegitimate daughter of a prostitute.

Before dealing with the evidence on this point, I wish to make a few preliminary remarks as to the manner in which the case for the plaintiff-appellant was argued in this Court. I do not think the case could have been more delicately and skilfully handled than it was by Mr. O'Connor for the appellant. His opening struck me as a very subtle piece of advocacy. He went straight to the main issue of marriage or concubinage; and proceeded to argue his client's case almost entirely on the circumstantial evidence. I think I am not doing him an injustice when I say that it was only under some pressure from the Court that he even read to us the evidence of Shujayat Ali Khan and Izharuddin Ahmad at all. On the question of the dower-debt he practically asked us to assume that a verdict in favour of the plaintiff must follow, as it were automatically, upon a finding that the marriage was proved. He laid stress on the fact that the defendants, denying that there had ever been any marriage at all, were of necessity precluded from setting up any alternative sum as the amount of the dower-debt. He put it to us that the plaintiff's evidence on this point was the only evidence we have to go upon and might be said to hold the field. If I am not mistaken, he went so far as to claim that the finding of the trial Court was in his favour on this point. I have thought it necessary to lay stress on this point. I have thought it necessary to lay stress on this presentation of the case for the appellant in order to repudiate it emphatically and to explain my reasons for approaching the consideration of the

evidence on totally different lines. The decision of the Court below requires to be appreciated as a whole. In finding against the plaintiff on the question of marriage the learned Subordinate Judge has necessarily rejected the evidence of Shujayat Ali Khan and Izharuddin Ahmad and has disbelieved the plaintiff's sworn statement as to the circumstances of her wedding ceremony and the fixing of the dower-debt. He has expressed himself a little clumsily in recording his finding on the issue as to the dower-debt; but what he says amounts in reality to no more than this; that if he had believed Shujayat Ali Khan and Izharuddin Ahmad about the marriage, he could have given no valid reason for disbelieving them as to the amount of the dower-debt. His finding is in substance and effect against the plaintiff on both points. Now, in spite of Mr. O'Connor's ingenious advocacy it is after all sufficiently obvious that a careful examination of the circumstantial evidence might lead the Court to the conclusion that there must have been at sometime or other, a lawful marriage between Raja Muhammad Salamat Khan and the plaintiff without such a finding enhancing in the very slightest degree the credit of the witnesses Shujayat Ali Khan and Izharuddin Ahmad. The Court might feel quite certain that the marriage took place considerably later than the year 1862 A. D., that it did not take place at Patna and that these witnesses were not present at the ceremony. To put the point quite bluntly, Mr. O'Connor's circumstantial evidence may or may not satisfy the Court that there must have been a marriage; but it can scarcely be said that it even begins to prove the amount of the dower-debt.

The claim before us is one for dower-debt, and not one for a share in the inheritance as widow of the late Raja. There is no presumption in favour of a sum of Rs. 40,000; the plaintiff does not say that Raja Muhammad Salamat Khan always fixed his wife's dowry at this amount, or that he did so as a special act of favour towards herself. What she says is that in the very respectable family from which she came the females were never given in marriage unless the bridegroom consented to a dower-debt of Rs. 40,000. The Court will believe or disbelieve her on this point according as it accepts or rejects her account of her

own antecedents generally. On the other side, the defendants have preferred evidence, which I see no reason to distrust, that the dower-debt of Raja Muhammad Salamat Khan's first wife was Rs. 5,000 and that in their family this was the amount which the bridegroom ordinarily consented to give. I do not think this commits them to any admission that the plaintiff, if married to the late Raja at all, must have been married for a dowry of Rs. 5,000; they deny both the marriage and the dowry, and it is quite conceivable that a gentleman like the Raja of Azamgarh might marry a favourite mistress, a former dancing-girl and prostitute, without fixing the dower-debt at the sum customary in his family in the case of an ordinary bride from a family of good position and repute.

I propose therefore in the first instance to take up and discuss the evidence on the question of the plaintiff's parentage and antecedents. From this I can pass on to estimate the credibility of the witnesses Shujayat Ali Khan and Izharuddin Ahmad, and to come to a finding as to whether it is proved that the plaintiff's dower-debt was fixed at Rs. 40,000. When this question has been disposed of, it will be time enough to consider whether any further finding is necessary to the decision of this appeal.

The account which Mt. Shabban Bibi gives of herself has been already indicated. If her statement stood alone, it would be open to comment on at least three points. About the migration of her family from Delhi to Patna the plaintiff was vague and self-contradictory; she seemed not to be sure herself whether it was her father or her father's father who first came to Patna. This might be excusable enough in an old lady of eighty; but it so happens that more than a year before the date of Shabban Bibi's examination the defendants had pressed for definite details as to the plaintiff's case regarding her parentage and history. They were given certain names in reply, and were told definitely that the plaintiff's father was a resident of a certain mohalla of the city of Patna; nothing was said about any migration from Delhi. One is left with a certain suspicion that the story of this migration was introduced at a later stage to frustrate the result of the inquiries which the defendants had in the meantime been making

at Patna. It is certainly unfortunate for the plaintiff that she should have contradicted herself on the precise question of this migration and that she should have been unable to name any surviving relative of her father or of her first husband. Secondly, it seems to me difficult to read the plaintiff's account of the manner in which her marriage with Raja Muhammad Salamat Khan came about and not feel dissatisfied and suspicious of the good faith of the story told. On a fair comparison of dates it would seem that Shabban Bibi must have been just about twenty-five years of age at the time of her alleged marriage with the Raja at Patna. She was living there at her father's house, the young widow with a child four years old or more. On her own showing, she had had singularly little to do with her first husband, Saiyid Abad Husain, and I should have liked some further explanation as to why that gentleman's family took no further interest in his widow, what became of the dower debt of Rs. 40,000 fixed at the time of this marriage and so on. What chiefly strikes me however is that I should like to know how Raja Muhammad Salamat Khan came to know of the existence of this eligible young widow, how the question of a marriage between them was first mooted and how Shabban Bibi's consent was obtained. The plaintiff admits that she does not know what connexion Raja Muhammad Salamat Khan had with Patna. She does not know if he ever visited her father's house, but she remembers having heard that correspondence was going on between the Raja and her father. She deposes:

"I do not know the contents of the letters, but I heard that letters were received from the Raja Sahib. When the day for marriage was fixed, I heard that the marriage had been settled with the Raja Sahib."

I cannot persuade myself to believe that this is the way in which the marriage of a widow of twenty-five is arranged, the family of the first husband ignored and the lady herself offered no option in the matter and only told about it when the very date of the proposed marriage had already been settled. Thirdly, the defendants succeeded in obtaining from the plaintiff a number of admissions which go far to support their case. The plaintiff deposed that her father had a mistress or concubine whom she calls "Chhutkan." This woman he kept for

for eight years or so in a separate house; but eventually she "became displeased" with him and went away to Azamgarh where she lived with "a man named Nanak Bakhsh." To this Nanak Bakhsh she bore two sons and a daughter, whom the plaintiff calls Hashmat Ali, Babar Ali and Masuma. These people visited Shabban Bibi while she was at the Fort as the wife of the Raja and the latter took Hashmat Ali and Babar Ali into his service.

This curious story is not improved in cross-examination. The plaintiff represents herself as asking the Raja, "Has Chhutkan come here?" (meaning to Azamgarh), and on his returning an affirmative answer, receiving his permission for Chhutkan to visit her at the Fort. On the plaintiff's version of the facts, I cannot understand her interest in this runaway mistress of her father's or how she could come to speak to the Raja about Chhutkan as if she were naming a person necessarily known to both of them, or why the Raja should befriend the family of this disreputable woman merely because she had once been the mistress of his wife's father especially when she had quarrelled with him and run away from his keeping. For corroboration of her story as to her parentage and antecedents the plaintiff has to rely entirely on the evidence of the two Patna witnesses already mentioned. Far and away the most reputable and satisfactory witness on her side on the question of marriage is the Pleader, Shah Salimullah (P. 4A et seq.); but he knows nothing of her antecedents. I have to discuss these two witnesses more in detail presently, but it may be said at once that on the question of Shabban Bibi's parentage and antecedents the witness Shujayat Ali Khan palpably broke down. He began by committing himself to a detailed support of all the plaintiff's assertions, professing throughout a firsthand knowledge of the family of Sadiq Husain and was deposing to his own presence at the first as well as at the second marriage of the plaintiff. In cross-examination he committed himself to the following statements. He (the deponent) had never been to Patna in his life until he came there on the occasion of his first marriage; it was then that he settled down in the house of the father of the lady whom he married in the Diwan Mohalla of Patna

city. Shabban Bibi's marriage with Raja Muhammad Salamat Khan took place "nearly a year after" the aforesaid first marriage of the deponent, and four or four and a-half years after the Mutiny i.e., in 1861-2 A. D. Therefore this witness first came to Patna about 1860 A. D. Now, it is an essential part of the plaintiff's case that Shabban Bibi's two marriages were separated by an interval of at least five years, and that her alleged first marriage with Saiyid Abad Husain took place before the Mutiny, it cannot be dated later than 1856 A. D. It follows that this witness cannot have been present at the plaintiff's marriage with Abad Husain in that the plaintiff had been a widow for at least two years when first witness came to Patna, and that he can have had little or no firsthand knowledge of the facts to which he had cheerfully sworn in examination-in-chief. I really think that if Nawab Shujayat Ali Khan had been undergoing examination in open Court, in a suit tried with the aid of a jury, the defendant's counsel might well have shrugged his shoulders, glanced at the jury and sat down, as soon as his cross-examination had reduced the witness' evidence to the hopeless tangle in which it stands at about the bottom of p. 20-A of our printed record. I am confident that he would have done so, if not at this point, then about one page further on, when he had tied up the witness into another hopeless knot over the question of the age of the plaintiff's child by her first husband. The witness Izharuddin Ahmad, being a permanent resident of Patna, was not liable to attack on these lines. The question of the general credibility of this witness I reserve for discussion at a later stage: for the present the position I arrive at is that the plaintiff's account of her parentage and antecedents rests upon her own testimony, plus that of this one witness, Izharuddin Ahmad, another witness on the same point having palpably broken down, and the plaintiff's evidence being liable to the comments already made.

In turning to the defendants' evidence on this point, I may say at once that they have, in my opinion, done their case a good deal of harm by want of candour on one question of detail. I take it that some one has been frightening them about the inference of lawful marriage which the Court might draw from long conti-

nued and exclusive cohabitation, they have accordingly made up their minds to refuse to admit that there was ever any exclusive cohabitation, in the strict sense of these words, between the plaintiff and the late Raja. They asked the Court to believe that Shabban Bibi was a light of love of Raja Muhammad Salamat Khan in the days when she followed the profession of a dancing-girl and common prostitute, and that the Raja only received her into his house and made provision for her there, out of pity, at a time when the lady and himself were so advanced in years and in such a declining state of health that there could be no question of sexual intercourse between them. The theory involves many improbabilities and cannot be fitted into the established facts of the case. It has compelled the defendants to speak of Shabban Bibi as now about a 100 years old, whereas the date given in the passport at p. 46-A fits in very well with the rest of the evidence and fixes the date of Shabban Bibi's birth at about 1837 A. D. I have no doubt the lady herself was pretty near the mark in speaking of herself as "a little below 80 years of age", when she was examined in the month of July 1915. This is all of a piece with another error committed by the defendants, and sufficiently exposed in the judgment under appeal, in putting forward another lady (said to be long since deceased) as the first permanent mistress or concubine of Raja Muhammad Salamat Khan.

It is unfortunate that the defendants should not have elected to be perfectly candid and straightforward in the presentation of their case, but after making every reasonable allowance for these considerations, I am satisfied that they have produced a very formidable body of evidence as to the parentage and antecedents of Mt. Shabban Bibi. The defendant Babu Khaliq Shah deposes that he knew Mt. Chhuttan as the kept woman of Nanak Bakhsh, Khatri, living in a certain quarter of the town of Azamgarh. This woman had two sons and two daughters besides the plaintiff; their names he gives as Babar Ali (alias Babban), Hashmat Ali (or Hashmat), Masuma (also called Mamman) and Hamidan (alias Zubaida). He professes to remember the plaintiff Shabban Bibi as an ordinary dancing-girl, appearing in public entertainments at which he was

present. He says she attracted the notice of Raja Muhammad Salamat Khan somewhere between the years 1861 to 1865 A. D., that there was an illicit connexion between them for 10 or 12 years and that the Raja finally received the woman into his Fort and assigned her quarters there, under circumstances already suggested. He gives a mass of details about Chhuttan's children, and especially about her son Babban, many of which are borne out in a striking manner by evidence presently to be noticed. At a late stage of the argument in our Court it was made matter for strong criticism against the deponent that he propounded no theory as to the parentage of the plaintiff's son Nanhe Khan; what strikes me as really significant on this point is that he was not asked a single question on the subject in the course of a lengthy cross-examination. The defendants caused to be examined on commission the widow of another brother of Raja Muhammad Salamat Khan, named Sakina Bibi. She says that the plaintiff was to her knowledge the daughter of Mt. Chhuttan and that she and her mother were professional dancing girls and prostitutes, when the late Raja made her acquaintance and eventually brought her into his Fort and assigned her quarters there. She says Nanhe Khan came with his mother, and was at that time about eight years of age.

Of course, this witness asserts that Shabban Bibi was never received by the other ladies of the family on the footing of a lawful wife; but I do not attach much importance to this part of her evidence. She has stultified herself by professing ignorance on the subject of the plaintiff's journey to Mecca; and I should not be much surprised to learn that a certain amount of reserve had marked the social intercourse between an ex-dancing girl and the other ladies of the household, even though the former might have succeeded in wheedling the Raja into a marriage. The other oral evidence for the defendants on this point consists of the depositions of Sayyid Zair Husain, son-in-law of the elder defendant; of a household servant named Baqridda and an ex-servant named Sabir Khan; of Sharif Khan, a nephew of Raja Muhammad Salamat Khan's first wife; of Sheikh Bakhtawar, a cloth merchant of Azamgarh city, and of Mathura Prasad Singh,

a land-holder of the neighbourhood. Some of this evidence is obviously partial, and portions of the statements of the various witnesses are no doubt open to criticism; but I am bound to say it seems to me to constitute, as a whole, a formidable body of evidence in support of the propositions that the plaintiff Shabban Bibi lived for sometime in Azamgarh as the daughter of Mt. Chhuttan, and that she herself had danced in public before Raja Muhammad Salamat Khan withdrew her into the seclusion of his Zenana. The cross-examination of Mathura Prasad Singh, for instance, elicited nothing calculated to shake his testimony on these specific points; the appellant's counsel was reduced to making the most of a somewhat remarkable admission by the witness at the end of his cross-examination, to the effect that he "had been fined once or twice in connexion with murder and fishing forcibly." In the absence of further details regarding these curiously asserted and inadequately punished crimes, I cannot say that the witness stands discredited in my estimation by the admission.

It so happens however that the defendants are able to produce documentary evidence as to statements made, long before the commencement of the present dispute, by a person, since deceased, who undoubtedly possessed special means of knowledge as to the matters in question. It has been stated that this woman Chhuttan had a son by Nanak Bakhsh called Babar Ali or Babban. Incidentally, I note a document printed at pp. 54 and 55-R, which shows beyond doubt that in the year 1906 this man described himself as "Sheikh Babban" in certain proceedings before the Revenue Courts, and that his mother's name was entered in certain village papers with the appellation "Tawaif" quite frankly added as a description of her profession. When Shabban Bibi in the course of her examination stated that she did not know that Babar Ali was also called Babban, I am confident that she was not speaking the truth and her want of candour on this point impresses me unfavourably. Now it appears that this Babar Ali or Babban married a woman of the name of Sakina, and that in the year 1877 there was a scandal in connexion with the alleged abduction of this Sakina by the servants of the Raja of Jaunpur. Babar Ali

deposed that the woman was seized while going along the streets in a closed palanquin, that the abduction took place close to Raja Salamat Ali Khan's house and that Nanhe Khan (the son of the plaintiff of whom we hear so much in the evidence) was one of the eye-witnesses and was himself wounded in an attempt to rescue the woman. It is clear that the accused in the case made it part of their defence that this Sakina was no more than a common prostitute, and they cross-examined Babar Ali severely as to his own parentage and antecedents. He had to admit that his mother (Chhuttan) was not married to his father and he gives us the interesting details that she was originally of the Brahman caste, but was converted to Muhammadanism before becoming the mistress of Nanak Bakhsh. I attach no particular importance to the fact that he denied that she had ever been a professional prostitute, a man may be excused for stretching the truth a bit in defence of his own mother's character. The really interesting part of Babban's statement is to be found where he comes to speak about his sister. He says he had three sisters of whom only one was alive in October 1877, the date of his deposition. Two of these sisters he names as "Masuma" and "Zubaida" and alleges that they were married into respectable families. Then he goes on;

"My third sister's name is Shabban she is married to Raja Salamat Shah. Nanhe Khan is Shabban's son. She was married 22 or 23 years ago. Nanhe Khan was not born then."

It must be remembered that this remarkable statement was made in a case in which this same Nanhe Khan was being put forward as the principal witness for the deponent, and in connexion with an affair of which Raja Muhammad Salamat Khan cannot possibly have been ignorant. The pleadings and evidence in the present suit make it quite certain that Shabban Bibi was not married to the Raja as early as 1854-5 A. D., yet this date is approximately that given by the plaintiff and her witnesses for her alleged first marriage. No later date could be given in a case in which it was proposed to produce Nanhe Khan before the Court, but it could be contradicted by the man's apparent age. Nor does Babban say in so many words that Nanhe Khan was the son of Raja Muhammad Salamat Khan, still less that he was his

heir presumptive, born in lawful wedlock. Nevertheless, he does swear that Shabban Bibi is his own sister, that she is married to Raja Muhammad Salamat Khan, and that this "marriage" took place before the birth of Nanhe Khan.

Now as regards this question of the parentage of Nanhe Khan, I am afraid of saying either too much or too little. It is no one's case in this suit that he was the son of Raja Muhammad Salamat Khan; and it is quite certain that he was not born to the said Raja in lawful wedlock. Yet, in the discussion of various items of evidence in this case, all sorts of arguments were addressed to us in which the question of the parentage of Nanhe Khan was indirectly involved. Amongst the items of circumstantial evidence relied upon on behalf of the appellant, a good many were concerned with the late Raja's treatment of this Nanhe Khan and also of Afzal Khan son of the said Nanhe Khan. Both these men were allowed to arrogate to themselves the designation of "Babu," commonly used in this family for the younger sons of the house, as, for instance, defendant 1 himself. There are letters on the record in which Raja Muhammad Salamat Khan displays a remarkable fondness for Afzal Khan as a young child; and it is proved that as this young man grew up, the late Raja went out of his way to push him forward into positions of responsibility and public dignity. From all this we are asked by the appellant to infer, not merely that she herself must have been the lawful wife of the Raja, but that Nanhe Khan must have been born to her in lawful wedlock by her marriage with a respectable gentleman whom she calls Saiyid Abad Husain. Now, I am quite satisfied that the second of these inferences is wholly excluded by any fair consideration of the weight of the evidence. The direct oral testimony on behalf of the defendants as to the parentage and antecedents of Mt. Shabban Bibi far outweighs the evidence of that lady herself and of her witness Izhar-ud-din Ahmad, and all the circumstantial evidence is against the plaintiff. I would almost go so far as to say that, if there were nothing else in the case, I should be prepared unhesitatingly to act on my firm belief that "Nanhe Khan" is an impossible name for any legitimate son of "Saiyid Abad Hussain." The name, on

the face of it, claims a Pathan origin, inconsistent with the alleged "Saiyid" parentage. Moreover, if Shabban Bibi had borne Nanhe Khan in lawful wedlock to a respectable Saiyid gentleman, there was no earthly reason why Babar Ali should not have said so in October 1877, instead of venturing upon an audacious falsehood as to the date of his sister Shabban's "marriage" with Raja Muhammad Salamat Khan. It follows that there must be some other explanation of the late Raja's attitude towards Nanhe Khan and Afzal Khan, not based upon the respectability of Nanhe Khan's parentage. That explanation, in face of the reticence observed by both parties, cannot be given with certainty; I can do no more than venture on a suggestion in summing up what I hold to be the established facts on this part of the case.

I am quite satisfied that the plaintiff was the daughter of Mt. Chhuttan, the mistress of Nanak Bakhsh and mother of Babar Ali alias Babban, the lady frankly described as a professional prostitute in the village papers. It does not follow that her father was Nanak Bakhsh; indeed, I incline to the opinion that the plaintiff has correctly given her own father's name, the difference being that she was born to Sadiq Husain Khan of his mistress Chhuttan, and not of his lawful wife, if he had one. I hold it proved that the plaintiff was living in Azamgarh as the daughter of Mt. Chhuttan, while the latter was there under the protection of Nanak Bakhsh, Khatri, and carrying on the profession of a dancing-girl. I accept as true the evidence for the defendants that Shabban Bibi was trained as a dancing-girl and first came under the notice of Raja Muhammad Salamat Khan while appearing in public in this capacity. I have no doubt that the date of this may be fixed, on the strength of Babar Ali's statement, as about 1854 A. D. I am satisfied that the connexion between the plaintiff and Raja Muhammad Salamat Khan was in its inception nothing more than ordinary illicit intercourse between the Raja and a dancing-girl who had taken his fancy. I take it that Nanhe Khan was born under circumstances which made it impossible for anyone to feel quite certain as to his paternity; reading between the lines of the evidence I strongly suspect that Raja Muhammad

Salamat Khan came gradually to believe that the child had really been his own and that his subsequent attitude towards the plaintiff, towards Nanhe Khan and towards Afzal Khan was largely governed by this belief. That he did take Shabban Bibi to live with him in his Fort is admitted; that he did so after illicit intercourse between them had continued for some years I hold to be proved.

On the other hand, I find it also proved that he provided her with respectable quarters in his Fort, that he corresponded with her on terms of extraordinary confidence and intimacy; that he allowed her to be spoken of as his "wife," and that he put her forward on several occasions, in matters involving public and official correspondence, under the designation of "my second wife." Nevertheless, it cannot be shown that he ever himself spoke or wrote of her as his "Rani" or that he ever committed himself to the statement that she was his "wedded wife." As to the date on which Shabban Bibi passed under the exclusive protection of the late Raja, becoming a veiled lady inside his ancestral Fort, the evidence leaves me in some little doubt. It was certainly anterior by several years to Babar Ali's statement of October 1877; it may have taken place as early as 1861-2 A. D., the date given by the plaintiff for her marriage at Patna; but it was probably about 1866-8 A. D., according to the statement of defendant 1, who puts it "ten or twelve years" after the commencement of the illicit connexion.

In recording these conclusions, I have anticipated the result of the further analysis which I undertook to make of the statement of the plaintiff witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad. I quite definitely disbelieve these two witnesses. It is not merely that I consider their testimony heavily outweighed by direct and circumstantial evidence on the other side, my opinion is that a careful consideration of their statements shows them to be unworthy of credit.

I am afraid I must begin by saying that I am very little impressed with the arguments addressed to us regarding the respectability and social position of these witnesses. I do not want to hurt their feelings or anyone else's; but when we are told in argument that it is inconceivable that gentlemen of such independent position should come forward to bolster

up a false claim, we are obliged to consider precisely what this argument is worth. Izharuddin Ahmad is an ex-Sub-Inspector of Police, who somehow found it expedient to resign his post, after 17 years' service, without pension or gratuity. Nawab Shujayat Ali Khan is a needy scion of the ancient royal family of Oudh living on a pension of Rs. 25 a month; his own assertion that he is and has always been in a position to live in comfort and affluence by the sale of his ancient hoard of family jewels deserves no particular attention. How the evidence of these witnesses was obtained and why they support the plaintiff's case must remain matter for conjecture, but Mt. Ohuttan had been the mistress of a respectable Mahomedan gentleman of Patna and there is a great deal of free-masonry amongst ladies of her profession. The witnesses were examined under circumstances singularly unfavourable to the elucidation of the truth; and for this I am satisfied that they themselves, and those responsible for the conduct of the plaintiff's case, are wholly to blame. The first application on behalf of the plaintiff was that they should be examined on commission at Patna, and this was very properly rejected by the trial Court. The witnesses were admittedly served in Patna with summonses directing them to attend and give evidence before the Court at Azamgarh. Thereupon they both discovered some flimsy excuse for removing themselves to Calcutta, out of reach of the process of the Azamgarh Court, and compelled the trial Court to direct their examination on commission at that place. Of the manner in which that examination was conducted I find it difficult to speak with patience.

The counsel representing the defendants adopted in his cross-examination a bullying tone, which may have been justified by his instructions and might possibly have been effective before a jury, but which certainly did no good under the circumstances. The learned gentleman who represented the plaintiff before the Commissioner in Calcutta is not subject to the disciplinary jurisdiction of this Court. I cannot call upon him for an explanation of his conduct and I therefore refrain from characterizing it in the terms which it seems to me to deserve. The only conclusion I can draw

from it is that he had instructions that the witnesses could not stand cross-examination and must be protected at all hazards from any question calculated to elicit the truth. The cross-examiner in our Indian Courts suffers under one grave disadvantage in that he has to regulate his questions by the pace at which the answers can be taken down in long hand. It has often occurred to me to wonder how many of the classical instances in which false witnesses have been exposed in the English Courts under the stress of really able cross-examination could have been successfully duplicated before a Subordinate Judge out here, distracted by the paramount necessity of compiling a "record" as the basis for a future appeal. Nevertheless, I have known a good cross-examiner work wonders even under this handicap; but to give him any chance at all he must at least be allowed to exercise his art under the protection of a Court capable of enforcing the ordinary decencies of professional conduct on his learned opponent. As a sample of what took place in this suit before the helpless (and, I have no doubt, disgusted) Commissioner, I take the following from p. 21-A of our record.

Nawab Shujayat Ali Khan was asked whether, at the marriage of Shabban Bibi with Sayid Abad Husain, he had heard the formula known as the "Sigha" recited in Arabic. The question was objected to; the utter futility of the objection was disclosed a moment later when the question was allowed to be repeated in this form, whether any Sigha was recited at this marriage. Now the question as originally put was not only a proper one, it was quite clear. The witness stood committed to the statement that this marriage with the gentleman of Saiyid race took place in the Sunni form; and the "Sigha" is recited at Shia, but not at Sunni weddings; when therefore this legal gentleman interposed with his groundless, but by no means purposeless, objection, he might just as well have stood up and shouted to the witness:

"Be careful how you answer that; there is a catch in the question."

He would not have done the thing twice in the Court of any Judicial Officer fit for the position of a Subordinate Judge; but before the unfortunate Commissioner

he did it again at p. 22-A, again at p. 23-A, and twice more under aggravated circumstances in the course of the cross-examination of Izhar-ud-din Ahmad at p. 34-A; though it is interesting to note that on the second occasion he was just too late, the witness had put his foot in the trap before he could be stopped. One can only wonder what opinion they hold in Calcutta regarding the competence and intelligence of the Courts in these provinces, if they really suppose us capable of decreeing a claim for Rs. 40,000 on the practically unsupported testimony of two witnesses whose cross-examination was conducted under these conditions. After having said this, it is really idle for me to discuss further details in this evidence. I might comment on Izhar-ud-din's remarkable statement that he is positive as to the amount of the dower-debt in this case because no woman is married in Behar for any lesser dowry; or point out that, according to his admissions on p. 34-A, he either knows nothing about the three gentlemen named as having acted as "Kazi" and formal witnesses to the plaintiff's marriage with Raja Muhammad Salamat Khan, or else really believes them to be still alive and residing in Patna city, whereas it is an essential part of the plaintiff's case that they are dead. Nor need I insist on the witness, obvious belief (before he hastily corrected himself p. 36 A) that there was railway communication open between Azamgarh and Patna at the date of the alleged marriage. I am therefore not particularly impressed with the fact that this ex-Police Officer was clever enough (also p. 36-A) to turn on his cross-examiner, by asserting that it was not any agent of the plaintiff's who had arranged with him about the evidence he was to give, but, on the contrary, the general attorney of the defendants had brought him their compliments and a polite request not to give evidence in the case. Once the witness had been named, the defendants knew quite well that he would have to give evidence; if they had decided to tamper with him, their request would have taken a very different form.

I have given reasons enough for concurring with the Court below in rejecting the direct evidence for the plaintiff on the subject of her marriage at Patna in 1861-2 A. D. This involves the failure of the claim for Rs. 40,000 on account

of dower-debt. It has not been suggested before us in argument that we are bound to come to some finding on the question of marriage or concubinage in order that if we find a marriage of unknown place or date established by the circumstantial evidence, we might decree in favour of the plaintiff the minimum dower-debt prescribed by Mahomedan law. One reason why the point was not taken may be the provision made for the plaintiff by the deed of 22nd February 1886, which is very far in excess of the minimum dowry. I feel serious doubts whether we ought to discuss further the circumstantial evidence in favour of the proposition that a marriage must have taken place, on some date or other and probably inside the Fort at Azamgarh, between the plaintiff and the late Raja Muhammad Salamat Khan.

The plaintiff has elected to reserve the question of her claim to a share in the estate to a separate litigation; in such a litigation she would have to take the opinion of the Court as to the effect of her deed of relinquishment of 22nd February 1886 (P. 44R) and also as to the validity of the dispositions of his property effected by the late Raja in his life time. If the plaintiff desires to carry the matter further, even a finding in favour of the marriage in the present suit would not operate so as to conclude the litigation. In the case now before us, the plaintiff stands committed to the plea that her marriage with Raja Muhammad Salamat Khan took place inside the house of Sadiq Husain Khan, in the city of Patna, in or about the year 1861-2 A. D. My finding is that no such marriage took place. The circumstantial evidence relied on by Mr. O'Connor is evidence that a marriage took place somewhere, perhaps before 1877, or 1880 A. D. but certainly before the plaintiff went on pilgrimage to Mecca in 1887 A. D. ostensibly as the "second wife" of Raja Muhammad Salamat Khan. The evidence about this pilgrimage is a strong point in the plaintiff's favour, read in connexion with the evidence of Shah Salimullah (P. 4-A), who strikes me as a truthful witness, it becomes even stronger. This gentleman's father was a religious teacher of some local renown; he had made disciples of the late Raja and of his mother, as well as of the plaintiff. The pilgrimage to Mecca must have taken place

under the influence of this conversion and so to speak, under the auspices of this spiritual guide, It seems equally hard to believe that Raja Muhammad Salamat Khan would have deceived his spiritual guide as to the plaintiff's position, or that the latter would have allowed him to make the pilgrimage in the company of his mistress, passing her off as his wife, yet there are arguments on the other side, and more particularly the wording of the Raja's deed of 22nd February 1886. It is true he once more calls Mt. Shabban Bibi "my second wife", but he avoids calling her his "Rani" or his "wedded wife", and the whole tone of the document is inconsistent with the idea that he regarded her as heir to a substantial share of his estate under the ordinary rules of Mahomedan law.

I do not propose to pursue this matter further. It is one thing for a lady in the position of this plaintiff to ask the Court to infer from evidence of long continued and exclusive cohabitation, on the ostensible footing of a lawful wife, that there must at some time or other have been a valid marriage between herself and the late Raja Muhammad Salamat Khan; it is not quite the same thing to set up a marriage at a particular time and place, and then to fall back on the circumstantial evidence when the case actually set up has been disproved. Moreover, when once the Court has come to a clear finding, as I think we must do in this case, that the connexion between the parties was in its inception an illegitimate one, it is a very difficult matter to infer a subsequent marriage from the sort of evidence with we are asked to rely upon in this case. On the evidence as it stands, I think the proper course is to dismiss the appeal upon a finding that neither the marriage set up by the plaintiff, nor the dower-debt claimed by her, is proved by the evidence.

Walsh, J.—I agree that this appeal must be dismissed. I am satisfied that the story of the Rs. 40,000 dower debt is a myth, and that the plaintiff's claim in this suit must fail. It would, I think, be unfortunate if we were to leave our own opinion on the question of the plaintiff's marriage in doubt after this protracted and expensive litigation. It may be that our view will not in law irrevocably bind the parties. But I think that the parties, after all the able argument to which we

have listened, are at least entitled to my opinion for what it is worth. If the documents and the admitted facts of the case, such as the acceptance of the plaintiff as a disciple and the subsequent pilgrimage to Mecca, stood alone, I should unhesitatingly find it proved beyond doubt that at some time or another the Raja eventually married this woman, but that, being the class of woman she was, she freely and with full understanding relinquished all her rights in exchange for the present transfer which was made to her, and which gave her a certain independence. But I have come to the conclusion, having regard to the false case of the Patna marriage, and the extravagant dower which she has foolishly set up in her old age, that she is unable to prove anything better, and that any Court ought to hold that, such a ridiculous story is hopelessly inconsistent with the existence of an honest one, or of any real marriage at all. I would add that I entirely agree with all that my brother has said about the general conduct of the examination of the Patna witnesses before the Commissioner at Calcutta. Such proceedings only bring the law into discredit and contempt. They react upon those who are responsible for them. The impression left upon my mind by the proceedings adopted for getting the evidence of these witnesses on to the record, and by the conduct of the plaintiff's representative while they were under examination, is that the evidence given by these two men is quite worthless.

By the Court.—The appeal is dismissed with costs, including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 123

STUART and RYVES, JJ.

Ratan Sen Singh—Plaintiff—Appellant.

v.

Tripathi Ugarnath and others—Defendants—Respondents.

First Appeal No. 253 of 1916, Decided on 17th July 1919 from the decision of Sub. Judge., Basti, D/- 29th July 1916.

Civil P. C. (1908), S. 11—Property mortgaged by way of conditional sale and then by simple mortgage—Decree obtained on simple mortgage—Whole of equity of redemption in property mentioned in deeds of conditional sale and portion of equity of re-

redemption of others purchased by mortgagee—Suit for foreclosure in respect of mortgages by conditional sale—Full amount due demanded—No mention of purchase of any portion of equity of redemption made nor reduction in amount allowed in amount to be paid—Decree passed and full amount paid by mortgagor—Subsequent suit for declaration by mortgagee that he was full owner of property of which he had purchased equity of redemption—Suit was barred by principles of res judicata as well as equitable estoppel—Evidence Act (1872), S. 115.

T. executed three deeds of conditional sale in favour of the Raja of Bansi, and subsequently executed a simple mortgage in the Raja's favour. The Raja instituted a suit on the last mortgage and obtained a simple money-decree, in execution of which he brought to sale the whole of the equity of redemption of some of the properties mentioned in the deeds of conditional sale, and a portion of the equity of redemption of others, and purchased these interests himself, and continued in possession without causing any entries to be made in the revenue records as to the properties of which he was the mortgagee and those of which he was the owner. The Raja then sued for foreclosure in respect of the three deeds of conditional sale, and demanded the full amount due thereon; he made no mention that he had purchased any portion of the equity of redemption, nor did he allow for any reduction in the amount to be paid for redemption in virtue of his purchase of a portion of the equity of redemption and, in the course of the suit he denied that he had made such a purchase. He obtained a decree and the mortgagor paid up the amount due. The Raja then instituted the present suit for a declaration that he was the full owner of the properties of which he had purchased the equity of redemption. The trial Court dismissed the suit on the ground that it was barred both by res judicata and by the principle of estoppel. On appeal to the High Court:

Held; that the suit had been rightly dismissed and that as the Raja had deliberately agreed to return the property free of all encumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel, and this would be so even if the defendant was in a position to know that the plaintiff had a title under which he could have retained full proprietary rights over a portion of the property concerned. [P125 C 1]

B. E. O'Connor, Tej Bahadur Sapru, and Iswar Saran—for Appellant.

Moti Lal Nehru and Baldeo Ram Dave—for Respondents.

Judgment.—Tripathi Ugarnath, who is the head of a family of Tewari Brahmins in the Bansi Subdivision of the Basti District, executed three deeds of conditional sale on 8th June 1883, 8th September 1884 and 19th June 1885 in favour of Raja Ram Singh, who was then the Raja of Bansi. By these deeds he mortgaged various properties. On 17th March 1887 Tripathi Ugarnath executed a deed of simple mortgage in favour of

Raja Ram Singh. The Raja instituted a suit on the basis of the deed of the 17th March 1887. In the course of the proceedings he withdrew all claim for relief other than a simple money decree. He obtained a simple money decree on the 28th April 1894, and in execution of that simple money decree he brought to sale (in some instances) the whole of the equity of redemption in certain property mortgaged under the first three deeds and (in other instances) a portion of the equity of the redemption in certain other property mortgaged under the first three deeds, and purchased these interests himself. The sale took place on 20th May 1901, and was confirmed on 16th July 1901. The Raja being in possession of the property mortgaged under the first three deeds, continued in possession but made no attempt whatever to have an entry made in the revenue papers to show of what portion of the property he was mortgagee and of what portion he was owner. The Raja died. He was succeeded by Raja Rattan Sen Singh, who died during the course of these proceedings. Raja Rattan Sen Singh instituted suits for foreclosure on the first three deeds. In those suits he demanded that the mortgagors should pay the full amount due on these deeds but did not state anywhere that he had purchased any portion of the right of equity of redemption himself, and he allowed for no redemption of the amount to be paid for redemption in view of the fact that he had acquired a portion of the equity of redemption himself, and when the other side suggested (in one suit at any rate) that he had purchased a portion of the equity of redemption himself, he appears to have denied the allegation. He obtained decree in the following form:

"That the full amount due under the deeds should be paid to him by certain date and if these amounts are not paid to him the property should be held foreclosed to him but that if the amounts were paid, it should be incumbent on him to return the property to the defendants clear of all mortgages and charges which the plaintiff or anybody through him might have created on it as also to give possession over the property to the defendants."

The mortgagors paid up the amounts due under the decrees in 1911 and 1912. The Raja then instituted a suit for a declaration that he was full owner of portions of the property to the extent to which he had purchased the portions of the rights of the equity of redemption.

The learned Subordinate Judge dismissed his suit on the ground that it was barred both by *res judicata* and by the principle of estoppel. The present first appeal is preferred. We consider that the learned Subordinate Judge rightly dismissed the suit. He states in his judgment:

"Leaving aside the many arguments which the learned lawyers addressed to me on behalf of the plaintiff and the learned expositions of the law of *res judicata* which they made what I want to ask is how can the plaintiff back out of the express order in the decree whether rightly or wrongly made. I do not think he can so long as decrees are decrees."

There is much sound sense in this reasoning. Further it is to be noted that by carefully suppressing his present pleas the plaintiff-appellant obtained something like double the amount of the money to which he would have been entitled had he advanced them. We consider this a clear case of *res judicata*, and the plea of equitable estoppel appears also to have been made out in spite of the fact that it must be presumed that the defendants-respondents were aware of the purchase of the rights of equity of redemption. But it is to be noted that when they themselves put the point forward apparently in order to reduce the amounts that they had to pay the plaintiff-appellant apparently denied that he had made any purchase, and the Court held against the defendants-respondents because they were unable to prove the allegation. When the plaintiff-appellant deliberately agreed to return the property to the defendants clear of all mortgages and charges provided they paid a certain amount, and they did pay that amount, it appears to us that this suit would be barred by equitable estoppel, even if the defendants-respondents were in a position to know that the plaintiff-appellant had a title under which he could have retained full proprietary rights over a portion of the property concerned. We therefore dismiss this appeal with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 125

KNOX, J.

Parshotam Das—Accused—Applicant.

v,

Emperor—Opposite Party.

Criminal Revn, No. 812 of 1918, Decided on 15th January 1919.

U. P. Municipalities Act (1916), S. 314—Prosecution for offence under Act started by Inspector of Water Works is not legal—Authority of Municipal Board is necessary.

Under S. 314 a prosecution in respect of an offence punishable under the Act can be started only on the complaint of or upon information received from the Municipal Board or some person authorised by the Board by general or special order in this behalf. An Inspector of Water Works has no authority to start a prosecution in respect of an offence punishable under the Act. [P 125 C 2]

G. P. Boys and Purushottam Das Tandon—for Applicant.

R. Malcomson—for the Crown.

Judgment.—Parshotam Das has been convicted by a Magistrate of the First Class at Mirzapur of an offence which is set out in the judgment as violating the provisions of R. 53 (c) of the Water Supply Rules in throwing vegetables in the water whereby the water was likely to be fouled. He has applied to this Court in revision against his conviction, and one of the grounds on which he bases his application is that the only officer who could have made a regular complaint was the Secretary of the Municipal Board and the Inspector of Water Works had no authority to start a prosecution. The Water Works Act of 1891 has been repealed by the Local Act 2 of 1916. S. 314 of that Act says that unless otherwise expressly provided, no Court shall take cognizance of any of the offences punishable under that Act except on the complaint of or upon information received from the Board or some person authorized by the Board by general or special order in this behalf. It has not been shown to me that the prosecution in this case has been instituted by the Board or any person authorized by them in this behalf. The Board in this question is the Municipal Board. This objection is fatal and the conviction and sentence must be and are hereby set aside. The fine or any portion of it, if paid, must be refunded.

But I wish to point out that possibly this need not have been the result if the learned Assistant Government Advocate who has appeared on behalf of the Municipal Board had received proper instructions. The point taken by the learned counsel in this connexion has been clearly set out in the portion for criminal revision. A copy of that petition was sent down to the District Magistrate of Mirzapur and he asked for instructions

that were furnished to the Assistant Government Advocate. They run as follows :—" Seen, no instructions necessary." Then there are the initials of some person ; who that person may be I cannot say. Now if ever there was a case in which special instructions were called for, this was one. The record of the learned Magistrate who tried the case teems with difficulties. The case is not an ordinary case. From the record it appears that the complaint against Parshottam Das was that he with several members of his family ladies and children, visited the storage reservoir at Tanda, that the chaukidar of that place asked the accused not to enter the gravity main or the valve-tower. He is said to have been answered sharply. As I have virtually set aside the proceedings as being unauthorized, I do not wish it to be understood that I endorse all that has been said by the witness in the case.

The case has not been properly tried and no judicial pronouncement can be made upon the evidence as it stands, but the learned Magistrate who tried the case had before him allegations which were of a very serious nature. I repeat them here simply to show what the allegations in the case were. If Parshottam Das or any other person did, on 28th August, enter this reservoir or part of the reservoir and did compel the chaukidar as alleged, he was guilty of a very reprehensible act and an act that might have endangered the health of Mirzapur. If he has not been convicted the fault appears to me to be to a great extent with the District Magistrate of Mirzapur. He should undoubtedly have sent instructions to enable the Assistant Government Advocate to properly plead the case. We really do not know what place was invaded, how far the invasion of the place was an offence under the Water Supply Rules and we do not know whether any person authorized by the Board did institute this case. There is on the record a letter marked Ex. 1 of 10th October 1918. It purports to be a report made by one H. Chatterji to the Chairman of the Municipal Board of Mirzapur. It was a very proper report to have been made. It is endorsed apparently by the District Magistrate of Mirzapur. The District Magistrate may or may not be authorized to institute prosecutions. If he was, he should have supplied the

Assistant Government Advocate with this information and with the notification by which this fact could have been verified. The endorsement is apparently to the Subdivisional Officer and runs thus : " case instituted for act prejudicial to public health by fouling the town supply reservoir, instituted against Parshottam Das and sent to you for trial. "

If nothing more transpired then there appears to be no institution by the Board under S. 314, Local Act 2 of 1916 complaining of any offence under the Act. The Subdivisional Officer apparently entertained this view of the case, for on his record the offence complained of is set out as S. 277, I. P. C., and S. 47 (b) Water Works Act. An explanation of this matter should undoubtedly have been furnished to the Assistant Government Advocate. I will not allude to the other irregularities which has taken place and I make this special mention in the hope that the District Magistrates will take care to supply the Assistant Government Advocate with full and proper instructions when they are asked for them. If they do not and this is not the first time that this has occurred and the Assistant Government Advocate is therefore unable to supply necessary information, it is they who are responsible for miscarriages of justice, if any, do occur. I did at one time think of sending this case back for retrial but I felt that to make any such order would entail hardship upon the accused to which he ought not to be put.

V.B./R.K.

Order set aside.

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RAFIQUE AND PIGGOTT, JJ.

Ram Singh and others — Plaintiffs — Appellants.

v.

Baij Nath and others — Defendants — Respondents.

Second Appeal No 1548 of 1916, Decided on 20th November 1918, from decree of Dist. Judge, Moradabad.

(a) Transfer of Property Act (1882), S. 60
Mere admission that mortgagee has become owner does not extinguish mortgage.

A mere admission by a mortgagor or an understanding between him and the mortgagee that the mortgagee has become the owner of the mortgaged property cannot extinguish the mortgage or destroy the right of redemption of the mortgagor.

[P 128 C 1]

(b) Transfer of Property Act (1882), S. 60
— Act of parties referred to in S. 60 as extin-

guishing mortgage must be independent of mortgage transaction.

It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But the contract must not be part and parcel of the original loan or mortgage bargain. In other words, the act of the parties that is referred to in S. 60 as extinguishing a mortgage must be one which is independent of the mortgage transaction and is not a part and parcel of it. [P 128 C 1]

Gulzari Lal and Tej Bahadur Sapru—for Appellants.

Surendra Nath Sen—for Respondents.

Judgment. — The two Appeals Nos. 1548 and 1549 of 1916 are connected and arise out of one decree passed by the learned Judge of the lower appellate Court on 14th August 1916. The relevant facts are as follows : Paran Singh, Mohan Singh and Jhanda Singh executed a deed of mortgage on 17th September 1862 in favour of Nathu Singh and others in lieu of Rs. 1,600 in respect of ten biswas of Tarapur and ten biswas of Mukam. The mortgage was by way of conditional sale and the term was up to the end of October 1862. Both the mortgagors and the mortgagees are dead and the present litigation is between their descendants and certain transferees from some of the heirs of the mortgagees. The suit out of which these two appeals have arisen was instituted by the heirs of Paran Singh, one of the mortgagors, on 3rd August 1914, in the Court of the Subordinate Judge of Moradabad for redemption of the mortgage of 1862. Among the defendants were impleaded the heirs of the original mortgagees, the transferees from the latter, and the heirs of Mohan Singh and Jhanda Singh, the two other original mortgagors. The plaintiffs claimed to redeem the mortgage on the payment of Rs. 1,600. The separate sets of defendants raised various defences, some of which were common to all. It may be noted here that the pro forma defendants, namely, the heirs of Mohan Singh and Jhanda Singh, put in no defence. The Court of first instance decreed the claim of the plaintiffs.

Two appeals were preferred from its decree by separate defendants. The learned District Judge disagreed with the Court of first instance on the question whether the mortgage in suit subsisted at the time that the claim was brought. One of the pleas in defence was that there was no mortgage executed by the ancestors of

the plaintiffs, as alleged in the plaint, but a conditional sale and that after the expiry of the term fixed in the deed the sale had become absolute. Moreover, the act of the original mortgagors themselves had extinguished the mortgage of 1862 and the original mortgagees and after them their descendants had been in possession of the property sought to be redeemed as owners. The learned Judge in considering this plea came to the conclusion that the notices issued by the Tahsildar, one in 1862 at the instance of Paran Singh and the other in 1868 at the instance of Jwala Singh, one of the mortgagees, as also the entries in the revenue papers subsequent to the issue of these notices, showed that the mortgagors had by their own act extinguished the mortgage. He therefore held that there was no subsisting mortgage which the plaintiffs could redeem. The decree of the first Court was accordingly reversed and the claim of the plaintiffs dismissed. Because there were two appeals before the learned Judge from separate sets of defendants, two decrees were made against the plaintiffs and hence they have preferred two appeals here. Practically there is one appeal and the point at issue between the parties is one and the same.

It has been contended and contended very strenuously on behalf of the plaintiffs-appellants that there is no evidence on the record in support of the view of the learned Judge that the mortgagors had by any act of their own extinguished the mortgage of 1862. Moreover, the learned Judge did not quite appreciate the principle of law which he refers to by quoting S. 60, Act 4 of 1882. We have therefore to consider two points in the appeals, namely, first, whether there is any evidence to show that the original mortgagors by their act extinguished the mortgage of 1862 and whether that act of theirs under the law amounts to an extinguishment of the mortgage. The notice of 1862 was issued at the instance of Paran Singh asking for the mutation of names in favour of the mortgagees as owners on the ground of sale. There is nothing in the notice to show what sale it was and whether it was a sale independent of the conditional sale of 17th September 1862. There is no evidence on the record to show that the mortgagors subsequent to the mortgage sold their equity of redemption to the mort-

gagees prior to the notice issued by the Tahsildar on 13th December 1862.

In fact there could not have been any, as no mention of it is made in any of the written statements of the contesting defendants. Presumably the sale referred to in the notice is the conditional sale of 17th September 1862. The period fixed in the deed having expired at the end of October 1892, the parties inferred that the sale had become absolute. The notice of 1868 was, as we have already said, issued at the instance of one of the mortgagees. In that notice mutation of names is asked in favour of the mortgagees in the column of owners on the basis of possession. No mention of sale is made in it. After the issue of the two notices no doubt the names of the mortgagees were entered as owners and no objection was taken on behalf of the mortgagors. But a mere admission by a mortgagor or an understanding between him and the mortgagee that the mortgagee has become the owner cannot extinguish the mortgage or destroy the right of redemption of the mortgagor. In our opinion there is no evidence on the record to show that the mortgagors had by their act extinguished the mortgage of 1862. As to what act would amount to the extinguishment of a mortgage has been well illustrated in several rulings. We would refer here to two of them, namely, *Abdul Rahim v. Madhavrav Apaji* (1) and *Kanhayalal Bhikaram v. Narhar Laxmanshet Vani* (2). It was laid down in the latter case that it was open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan or mortgage bargain.

In other words, the act of the parties that is referred to in S. 60, Act 4 of 1882, and which is relied upon by the learned Judge must be one which is independent of the mortgage transaction and is not a part and parcel of it. In the present case all that we can find from the evidence is that the acts relied upon by the defendants were merely those which recognized the conditional sale to have become absolute and virtually done to enforce the clause in the deed according to which the conditional sale was to become

absolute after the expiry of the term. We therefore find that no acts of the mortgagors have been proved to show that they had parted with their equity of redemption or that they had extinguished the mortgage of 1862. This finding however does not dispose of all the pleas raised in the case before the learned Judge. He has virtually disposed of the appeal on a preliminary point. We therefore allow the appeal, set aside the decree of the lower appellate Court and remand the case to it for trial of the other issues raised before him according to law. Costs of this appeal will abide the event.

V.B./R.K.

Appeal decreed.

* A. I. R. 1919 Allahabad 128

RAFIQUE AND LINDSAY, JJ.

Mt. Maina Bibi and others—Defendants—Appellants.

v.

Wasi Ahmad and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 88 of 1916, Decided on 12th March 1919, against decision of Sub-Judge, Allahabad, D/- 18-5-1916.

*** (a) Mahomedan Law—Dower—Widow in lawful possession of husband's estate can retain possession against heirs till her claim for dower is satisfied—She is however liable to account for profits—She cannot set up right of possession against creditors—Claim for dower debt ranks equally with claims of other creditors of husband.**

Where a Mahomedan widow obtains possession of her husband's estate lawfully, i. e., without force or fraud, she is entitled as against the other heirs to retain possession of the entire estate till her claim for dower is satisfied, subject to an obligation to account for profits, and the co-heirs cannot eject her without payment of that portion of the dower debt which is chargeable to their share of the estate. In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee. She however cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate. She is not a secured creditor, her claim for dower debt ranks equally with the claims of other creditors of her husband.

[P 133 C 1, 2]

(b) Civil P. C. (1908), S. 11—Suit against Mahomedan widow for recovery of property held by her in lieu of unsatisfied dower—Plaintiffs granted decree for possession on payment within specified time of their share of dower debt—Failure by plaintiffs to make payment—Property then gifted by widow to sons and daughters of her sister's son—Suit by heirs for possession of their share, after her death held not barred under S. 11.

The heirs of a Mahomedan brought a suit against his widow to recover his estate which

(1) [1890] 14 Bom. 78.

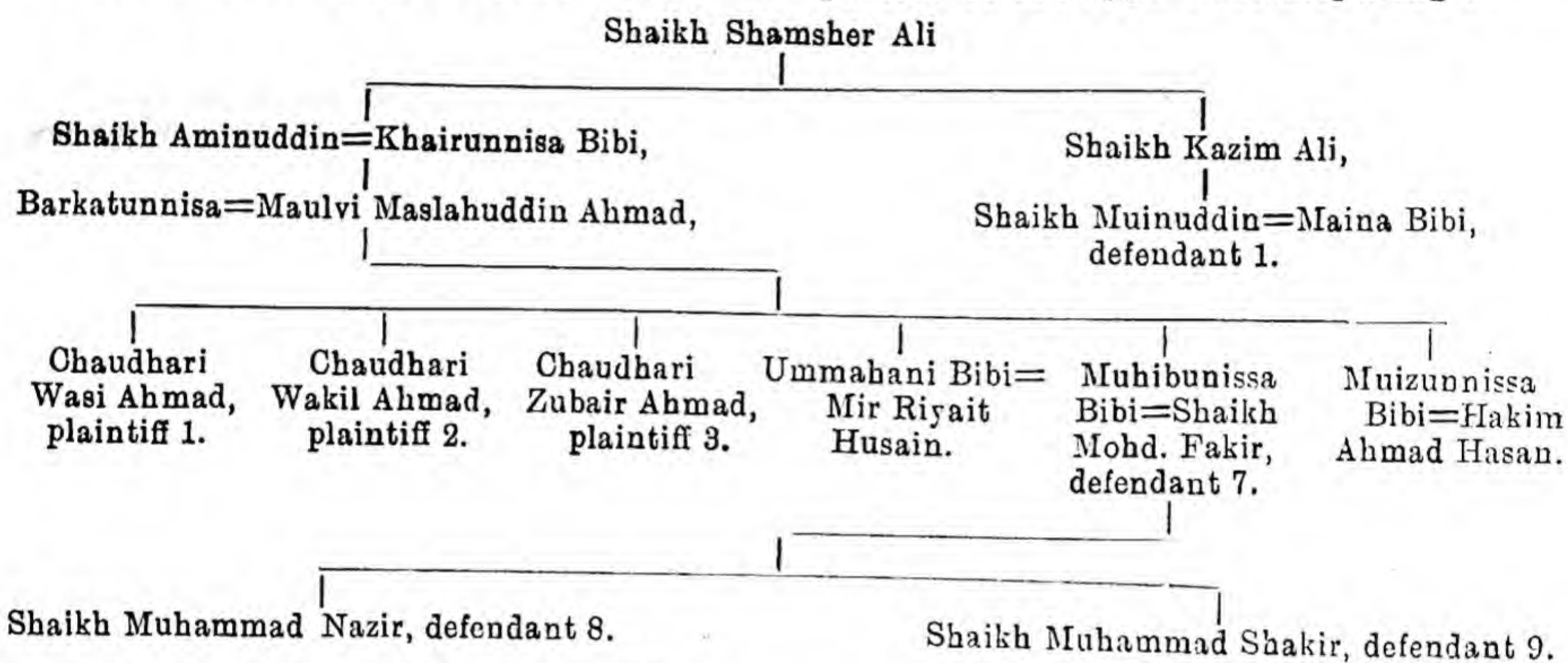
(2) [1903] 27 Bom. 297.

the widow was holding in lieu of unsatisfied dower, the amount of the dower was ascertained, an account of the profits received by the widow was taken, and the plaintiffs were given a decree for possession of their share of the estate on payment within a specified time, by them of their share of the dower debt, failing which the suit was to stand dismissed. The plaintiffs failed to pay, whereupon the widow made a gift of the entire estate to the sons and daughter of her sister's son, and the heirs then sued for possession of their share after her death :

Held : that the suit was maintainable and was not barred by the rule of res judicata.

[P 134 C 1]

* (c) Mahomedan Law—Dower—Widow in



Muinuddin died on 6th May 1890 possessed of immovable property the inheritance to which is in dispute in the present case. He died leaving him surviving his widow, Mt. Maina, and his cousin, Mt. Barkatunnissa. Mt. Maina entered into possession of the entire estate and professed to remain in possession in lieu of her unsatisfied claim for dower. Mt. Barkatunnissa died on 27th June 1892 and her husband Maslahuddin died on 17th August 1897. Her mother Mt. Khairunnissa died on 22nd December 1898. We refer to the husband and the mother of Mt. Barkatunnissa as under the Mahomedan law they and her children would be her heirs on her death. After her death and that of her mother and husband her sons became entitled to 72 sihams and her three daughters to 36 sihams in the estate of Muinuddin. Mt. Maina the widow was entitled to the remaining 36 sihams. On 13th May 1899 two of her daughters, namely, Mts. Ummahani Bibi and Muizunnisa Bibi instituted a suit for the recovery of their share in the inheritance, namely, 24 sihams, impleading Mt. Maina and the other descendants of Mt. Barkatunnissa

possession of estate in lieu of unsatisfied dower debt cannot alienate, it.

A Mahomedan widow in possession of her husband's estate in lieu of unsatisfied dower cannot, under the Mahomedan law, alienate the estate, though she may transfer her dower debt or her right to retain possession of the estate.

[P 135 C 1]

S. M. Sulaiman, Surendra Nath Sen and Motilal Nehru—for Appellants.

Tej Bahadur Sapru, Iqbal Ahmad, Hyder Mehdi and Mukhtar Ahmad—for Respondents.

Judgment.—The following pedigree will explain the right under which the parties to the appeal are disputing :

as defendants in the case. One of the pleas on behalf of Mt. Maina was that at the time of the death of Muinuddin, his aunt and his stepaunt were alive and Barkatunnissa was not an heir under the Mahomedan law to Muinuddin. She further pleaded that her dower debt was Rs. 51,000 and in lieu of it Muinuddin before his death had gifted the immovable property to her.

The pleas in defence were disallowed. The Court held that Mt. Barkatunnissa was an heir of Muinuddin; that the dower debt of Mt. Maina was Rs. 51,000 and that no gift had been made by Muinuddin of the property in question in lieu of dower. The claim of the two ladies was decreed for the recovery of 24 sihams on the payment of Rs. 3,943-12-10, the proportionate amount of dower payable by them. The money was paid and the two ladies recovered possession of their share. On 25th April 1902 the three sons of Barkatunnissa and her third daughter, Mt. Muhibunnisa, brought a suit for the recovery of 84 sihams impleading as defendants in the case Mt. Maina Bibi, Mt. Ayesha Bibi and Mt. Ummahani Bibi and

Mt. Muizunnissa Bibi. The last two were pro forma defendants. Mt. Ayesha Bibi was impleaded as a defendant in the case on the allegation that her right to succeed to the property left by Muinuddin was set up by Mt. Maina in the suit of 1819. The plaintiffs alleged in their plaint that the dower of Mt. Maina was fatmi dower that is Rs. 107, which had been realised by her from the income of the estate, and that they were entitled to immediate possession without payment of any sum. They however said that in case the Court found that any part of the dower had not been paid, they were willing to pay the amount determined by the Court. They accordingly prayed for possession of 7/12ths of the property without payment or in the alternative on payment of such sum as the Court might find due. Mt. Maina was the chief contesting defendant in the case. She pleaded that the dower was Rs. 51,000; that the entire property of Muinuddin was gifted by him to her in lieu of her dower; that the whole amount of the dower was still due; that she was entitled to interest on her dower at the rate of 1 per cent per mensem. She also advanced a plea of *jus tertii* by stating that Mt. Ayesha Bibi was the step-aunt of Muinuddin and that the descendants of a real aunt were alive at the time. We may also mention that one Abdul Shakur and some others had brought, about the same time, suits to recover the property left by Muinuddin, on the allegation that they were his cousins. Mt. Ayesha Bibi had also brought a suit for the recovery of her share in the property by right of inheritance on the ground that she was the step-aunt of Muinuddin. All the suits including the one of the three sons of Mt. Barkatunnissa were transferred for trial to the Judge of the Small Cause Court.

The suits of Mt. Ayesha Bibi and others in which the descendants of Mt. Barkatunnissa were also defendants with Mt. Maina were decided first and the learned Judge held that neither Mt. Ayesha Bibi nor Abdul Shakur and others were entitled to inherit the property left by Muinuddin, as they had failed to prove their alleged relationship. When the case of the sons of Mt. Barkatunnissa came to be tried, their title had already been settled by the decision of the other suits and the only points for determina-

tion were the amount of the dower the alleged gift of the property in lieu of dower and the rate of interest. The learned Judge held that the dower of Mt. Maina Bibi was Rs. 51,000 and not the fatmi dower; that Muinuddin had not made a gift of the property in suit in lieu of dower; that Mt. Maina Bibi was in possession of her deceased husband's estate in lieu of her dower; and that 3 per cent per annum should be allowed to her by way of interest. He further held that she was liable to account for profits received since the death of her husband. The accounts were taken and the proportionate amount due from the plaintiffs was found to be Rs. 25,387-5-5. A decree was accordingly passed in favour of the plaintiffs on 28th November 1903 for possession of 84 sihams out of 144 sihams on payment of the said sum within six months, and in default the claim of the plaintiffs was to stand dismissed with costs. The plaintiffs appealed to this Court and Mt. Maina Bibi filed cross-objections. The only point urged in appeal related to interest. Both the appeal and the cross-objections were dismissed and the decree of the first Court was affirmed on 3rd July 1906. The plaintiffs did not pay the sum of Rupees 25,387-5-5 and did not recover possession of the 84 sihams. Mt. Maina Bibi executed two deeds of gift in respect of the property in question on 18th March 1907 and 12th June 1907 respectively in favour of Khalilur Rahman, Obaidur Rahman, Shafur Rahman and Mt. Humairah Bibi, sons and daughter of Muhammad Isa, her nephew, that is, her sister's sons.

On 5th March 1908 Khalilur Rahman and Obaidur Rahman made a wakf of a portion of the gifted property and appointed their father Muhammad Isa as muttawali. On 22nd July 1915 the suit out of which this appeal has arisen was instituted by Wasi Ahmad, Wakil Ahmad and Zabair Ahmad, the three sons of Barkatunnissa, for the recovery of 72 sihams out of 144 sihams in the estate of Muinuddin. Mt. Muizunnissa had died in the meantime. The plaintiffs impleaded in the case as defendants Mt. Maina Bibi, her donees, Muhammad Isa, the muttawali, and the husband and the two sons of Mt. Mohibunnissa. The last three were pro forma defendants. In their plaint the plaintiffs, after reciting

the former litigation of 1902, stated that a considerable part of the sum of Rs. 25,387-5-5 had been realized by Mt. Maina from the income of the estate, and that she having parted with possession of the property, the plaintiffs were entitled to possession of the 72 sihams without payment. In case the Court was of opinion that they could not get possession without payment, they were willing to pay whatever sum was found due by the Court in respect of the balance of the dower debt payable by them. They stated their cause of action to have arisen on 18th March 1907 and 12th June 1907, the date on which the two deeds of gift were executed and possession passed out of the hands of Mt. Maina, and on 1st July 1915, the date of refusal by the donees to make over possession to them, the plaintiffs. The contesting defendants raised various pleas in defence. We need mention three of them only which have been pressed here before us namely that the claim was barred by *res judicata*; that the plaintiffs could not recover possession without payment of the proportionate sum found due for dower and that interest at 12 per cent per annum should be allowed on the dower debt. The Court of first instance repelled all the pleas in defence. The objection based on the plea of *res judicata* was disallowed on the ground that:

"the position of Mt. Maina Bibi who was in possession in lieu of her dower was analogous to that of a mortgagee, and that position was not altered or affected in any way by the decree (of 1902). What was done in the former suit was that the account was settled between the parties up to a certain date and the plaintiffs were given the option of paying the amount found due by a certain date if they wanted to recover immediate possession."

The second objection that the plaintiffs could not get possession without payment was rejected for the reason that Mt. Maina Bibi was no more in possession in lieu of her dower and the donees from her were not the donees of her dower debt. As to interest the rate allowed in the former suit, viz., 3 per cent per annum, was maintained. The Judge however recorded a finding on the proportionate amount of dower payable by the plaintiffs after taking into consideration the profits of the estate received by Mt. Maina Bibi. He came to the conclusion that the sum of Rupees 16,297-15-3 was due to her. The claim of the plaintiffs for possession was de-

creed without payment of any sum to Mt. Maina or her donees. The latter and the muttawali preferred the present appeal to this Court and Mt. Maina died during the pendency of the appeal.

The decree of the lower Court is challenged on three grounds only which we have already mentioned above. In support of the first ground, viz., that of *res judicata*, it is urged that the lower Court and the plaintiffs are under a misapprehension in thinking that the position of a Mahomedan widow in possession of the estate of her deceased husband in lieu of dower is analogous to that of a mortgagee or that a suit by his heirs against the widow for the recovery of possession of their share in his estate is similar to a redemption suit. It may be that in some cases her possession is described, for want of a better expression and in a loose way, as that of a mortgagee, but the incidents appertaining to the position of a mortgagee are wanting in her case. The case of *Ghulam Ali v. Sagir ul nissa Bibi* (1), is cited in support of the argument. In that case it was laid down that there was nothing to prevent a Mahomedan widow, who was in possession of the property of her late husband in lieu of dower, from suing to recover her dower from the heirs of her deceased husband. If the analogy of a mortgagee were applicable to a Mahomedan widow in possession of her husband's estate in lieu of dower, she could not sue for the recovery of her unsatisfied dower even by offering to surrender or surrendering her possession of the estate. The remarks of the learned Judges who decided the case of *Mirza Mohammad Sharafat Bahadur v. Shazadi Wahida Sultan Begam* (2) are relied upon to show that the suit by a widow for the recovery of her unsatisfied dower or by the heirs against her for the recovery of their share in the estate of her deceased husband is really in the nature of an administration suit. And where a decree in an administration suit is not executed and is allowed to be barred by lapse of time, no second suit would lie. It is further contended that if the position of a Mahomedan widow in possession of her husband's estate in lieu of her unsatisfied dower is analogous to that of a mortgagee, no second suit by the heir who shares in the inheritance would

(1) [1901] 23 All. 432.

(2) [1915] 28 I. C. 191.

lie as was held in *Sheikh Golam Hussein v. Mt. Alla Rukhee* (3) and *Muhammad Zakariya v. Muhammad Hafiz* (4). In any case the present suit is barred by the condition attached to the decree of 1903 to the effect that in case of default the suit was to stand dismissed. Reliance is placed on the case of *Lachman Singh v. Madsudan* (5). For the plaintiff-respondents the reply is that, as far as this Court is concerned, it has been held more than once that the position of a Mahomedan widow in possession of her late husband's estate in lieu of her unsatisfied dower is analogous to that of a mortgagee, vide *Azizullah Khan v. Ahmad Ali Khan* (6); and *Sita Ram v. Madho Lal* (7) is cited as authority for the proposition that a second redemption suit would lie where the right to redeem is not barred by act of the parties or by an order of Court.

The case of *Lachman Singh v. Madsudan* (5) is distinguished on the ground that in that case the decree provided that if the redemption was not made within the time specified, the right to redeem would be barred. The learned counsel for the plaintiffs-respondents contends that his right to inherit the property left by Muinuddin was not in dispute in the litigation of 1902. All that was in dispute in that case was whether the then plaintiffs could recover their share in the property without payment or if on payment, on the payment of what sum. The amount of dower as also the rate of interest were in dispute in that case. The amount of dower, the rate of interest and the amount payable at the time of the decree were determined by the Court and are questions which cannot be reopened. In the present case the plaintiffs are asking for an adjudication on the accounts since 1903. Their cause of action for the present suit is quite distinct from that in the suit of 1902. As to the conditions attached to the decree, that in case of nonpayment within six months the suit should stand dismissed, the order did not extinguish the right of inheritance but only the right to get immediate possession. In order to decide the point under discus-

sion we must first have a clear idea of the position of a Mahomedan widow in possession of her deceased husband's estate in lieu of dower. Under the Mahomedan law her position is described by Macnaghten in his well-known book of *Principles and Precedents of Mahomedan Law*. Case 10, at p. 356 is as follows:

"Question 1.—A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower in preference to the other heirs?"

Reply 1.—If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance."

The same question in another form is given in Case No. 25 at p. 275:

"Question 1.—Is the debt claimed by the defendant legally proved, and if so, the whole of the property, real and personal, of her deceased husband being absorbed in such debt is it to belong of right to his widow, or is it to be distributed among the heirs generally?"

Reply 1.—It has been proved, by the testimony of three competent witnesses, that the debt due to the defendant from her deceased husband on account of dower amounted to ten thousand gold mohurs and twenty-five thousand rupees, and a debt legally proved cannot be satisfied but by compromise or liquidation; so long as the debtor lives he is responsible in person, and on his death, his property is answerable, but there is this distinction between money and other property in cases of dower, namely that the widow is at liberty to take the former description of property, over which she has absolute power; but as to the other property, she is entitled to a lien on it as security for the debt and it does not become her property absolutely, without the consent of the heirs or a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter in spite of any objection urged by the heirs, who until they pay the debt have no legal claim against the creditor in possession to deliver up the estate."

After some conflict of authority in the case-law in the second quarter of the last century, the position described above was conceded to the Mahomedan widow. In the case of *Mt. Jance Khanum v. Mt. Amatoool Fatima Kahnun* (8) it was laid down that the widow of a Mahomedan in possession of her husband's estate under a claim for dower has a lien upon it as against those entitled as heirs and is entitled to possession as against them

(3) [1871] 3 N. W. P. H. C. R. 62.

(4) [1917] 39 All. 506=41 I. C. 233.

(5) [1907] 29 All. 481.

(6) [1888] 7 All. 353.

(7) [1901] 24 All. 44.

(8) [1867] 8 W.R. 51.

till her claim for dower is satisfied. The same view was taken in the case of *Ahmed Hossein v. Mt. Khodeja* (9). In that case too, the learned Judges said that a Mahomedan widow in possession of her late husband's estate in lieu of her dower has a lien on the property as against the other heirs of her husband. The same point came up for decision before their Lordships of the Privy Council in the case of *Mt. Bebee Bechun v. Sheikh Hamid Hossein* (10). Their Lordships held that a Mahomedan widow was entitled to retain possession of her late husband's estate in lieu of her dower as against his heirs. As to the nature of her possession, they observed as follows:

"It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein v. Mt. Khodeja* (9)."

Whatever the right may be called it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her dower debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This expression of opinion has been uniformly and consistently followed by the Courts in this country since. We have referred to the text and the case-law applicable to Sunnis. The parties to this appeal belong to the Sunni sect. The same view has, however, been adopted in the case of Shias also: vide *Ameeroonnissa v. Moora-doonnissa* (11).

From the authorities quoted above and from the various treatises on Mahomedan law it appears that the position of a Mahomedan widow with respect to the right to retain possession of her deceased husband's estate is a peculiar one. Where she has obtained possession lawfully, i.e., without force or fraud, she is entitled as against the other heirs to retain possession of the entire estate until her claim for dower is satisfied. On the other hand she cannot set up any such right of possession against creditors claiming to have the debts owing to them from the husband satisfied out of the estate. She is not a secured creditor, her claim for

her dower debt ranks equally with the claims of other creditors of her husband. It may be that the use of expressions like "lien" and "security" in describing the right of the widow against the co-heirs to which we have just referred is calculated to produce confusion and it may be that these expressions as used in works on Mahomedan law do not import all that is meant when they are used by English lawyers. And it may certainly be conceded that the widow's position with regard to her co-heirs is not in all respects that of a usufructuary mortgagee.

But it is not to be denied that in some respects her position does resemble that of a mortgagee in possession and whatever language may have been used from time to time for the purpose of describing her position compendiously it cannot be doubted that as against the co-heirs she has the right to remain in possession till her claim for dower is satisfied subject to an obligation to account to them for profits, and the co-heirs cannot eject her without payment of that portion of the dower debt which is chargeable to their share of the estate. In this sense and to this extent the right of the widow is analogous to that of a usufructuary mortgagee.

Bearing this position in mind, let us examine the former litigation and compare it with the present one. In the suit of 1902 the findings were that Mt. Maina Bibi was in possession in lieu of dower; that her dower was Rs. 51,000, that she was entitled to interest at 3 per cent per annum on the dower debt; and that the proportionate amount due to her from the then plaintiffs was Rupees 25,387-5-5. The claim was decreed subject to the condition of payment of Rs. 25,000 odd within 6 months of the date of the decree. The decree further provided that in case of default in payment within the prescribed time, the claim should stand dismissed with costs. The proprietary title of the plaintiffs now before us or of those in the suit of 1902 was never in dispute in either case. The plaintiffs were admittedly heirs entitled by inheritance to a share in the estate of Muinuddin. The right of the plaintiffs to recover possession from the widow was not disallowed, but was allowed conditionally, that is, on the payment of the sum found due to the widow. In the litigation of 1902 the plaintiffs

(9) [1868] 10 W.R. 368.

(10) [1870-72] 14 M. I. A. 377=3 Sar. 39 (P.C.).

(11) [1854-57] 6 M.I.A. 211=1 Sar. 533 (P.C.).

were held to be entitled to secure possession on the payment of Rs. 25,000 odd. Since then the situation has considerably altered. Mt. Maina Bibi was a party to the present suit, but she was not in possession of the estate of her deceased husband in lieu of her unsatisfied dower. She had parted with possession to her donees about eight years prior to the institution of the suit. The heirs seek possession of the property and that can only be obtained from the donees of Mt. Maina. The right to retain possession has not been transferred (according to the contention of the plaintiffs) to the donees, but the property itself has been transferred and this according to the Mahomedan law and the case law the lady could not do. The cause of action therefore is distinctly different from that in the former suit, and the principle of *res judicata* does not apply.

If on the other hand it be said that the transfer by Mt. Maina Bibi to the descendants of her nephew was a transfer of her dower debt, still, in our opinion, the present suit is maintainable. In the case of 1902 the amount of the dower, the rate of interest and the sum payable by the plaintiffs before obtaining possession, up to the date of the decree, were determined. These three points are not in issue in the present case and if either party raised them in the pleadings in the Courts below, they must be considered to be *res judicata*. In the present case if accounts have to be gone into, they would have to begin from the date of the decree in the former suit, namely 28th November 1903. In other words the present suit seeks for an adjustment of accounts since the decree in the first suit. The decree of 1902 did not extinguish the right of the plaintiffs to inherit the estate of Muinuddin, and therefore they can maintain the present suit for the ascertainment of the sum now payable by them. Some cases were cited on behalf of the plaintiffs-respondents in support of this view, which we may note here. *Roy Dinkur Doyal v. Sheo Golan Singh* (12), *Sita Ram v. Madho Lal* (7) and *Rama Tulsa v. Bhagchand* (13).

All the three cases arose out of redemption suits. The cases relied upon by the learned Counsel for the appellants do not

cover the facts of the present case. The case of *Sheikh Gholam Hussein v. Mt. Alla Rukhee* (3) was a case where a mortgagor sued for redemption and obtained a decree. It was found by the Court that the whole of the mortgage money had been satisfied and that the mortgagor was entitled to immediate possession. The mortgagor did not put the decree into execution and after it had become barred by time brought a fresh suit. The Court held that a second suit did not lie and for a very good reason, namely that the relationship of mortgagor and mortgagee had been determined in the first suit, because of the finding that the mortgage had been satisfied. The case of *Muhammd Zakariya v. Muhammad Hafiz* (4) is also distinguishable. The facts of that case were that :

"a mortgage bond provided, among other things, that interest would be paid to the creditor monthly and if for any reason the interest was not paid for six months, the creditor would be competent to realise by suit without waiting for the expiry of the term either the unpaid interest or the principal and interest with costs."

It was further stipulated that if the bond was not paid within the period fixed, then the whole amount, principal and interest, would be realised by the creditor by suit. The mortgagee first sued for the recovery of interest only as default was made in the payment of it. He obtained a decree without contest. Subsequently he sued for the recovery of money, principal and interest, due on the mortgage-deed and one of the pleas in defence was that the claim was barred by O. 2, R. 2, Civil P. C. The Court held that the claim was so barred. In the appeal before us no such omission was made by the plaintiffs and O. 2, R. 2, Civil P. C., has no application. As to the case of *Lachman Singh v. Madsudan* (5), we think it is also inapplicable to the present case. We have already remarked above that the right of the plaintiffs to inherit the property of Muinuddin was not extinguished by any order in the decree of 28th November 1903. The words in the decree were "that in case of nonpayment within the prescribed time, the suit shall stand dismissed." Similar words were used in the case of *Sita Ram v. Madho Lal* (7), where the decree said that in case of nonpayment of the redemption money within the prescribed time, the decree will be considered non-existent. We therefore find that the

(12) [1874] 22 W. R. 172.

(13) A. I. R. 1914 Bom. 200=39 Bom. 41=27 I. C. 249.

present claim of the plaintiffs is not barred by the principle of *res judicata*.

The next point urged is that the plaintiffs cannot recover possession of their share of the property without payment of a proportionate amount of the dower debt. It is contended on behalf of the appellants that the right of a Mahomedan widow in possession of her husband's estate in lieu of dower is heritable and that a suggestion has been thrown out in some cases of this Court that it is also transferable. It is true that Mt. Maina by her deeds of gift transferred the property describing herself as the owner of it, but, it is argued, the larger right includes the lesser one, and if she had no right of ownership in the property she at least had the right to retain possession of it and she should be taken to have transferred whatever rights she had in the property. The case of *Ali Bakhsh v. Allahdad Khan* (14) is relied upon. We have examined the language of the two deeds of gift and we find that Mt. Maina did not profess to transfer her dower debt or her right to retain possession of the property of her husband in lieu of her dower to the donees. She describes herself in the two deeds as the owner of the property for two reasons, viz. first, that the property in question had been gifted to her by her husband in lieu of her dower during his lifetime and secondly, a default having been made in the payment of the decree of 1902, she had become the absolute owner of the property. It is therefore quite clear that she did not transfer nor did she mean to transfer her dower debt or her right to retain possession of the property to her donees. We are not prepared to accede to the contention of the learned counsel for the appellants that because she transferred the whole property believing herself to be the owner of it, she should be taken to have transferred her dower debt and her right to retain possession in lieu of it. Under the Mahomedan law it is distinctly laid down that a Mahomedan widow in possession of her husband's estate in lieu of unsatisfied dower, cannot alienate the estate, vide *Wilson*, para. 162. A similar point arose in another case before this Court. In the case of *Mohammad Husain v. Bashiram* (15) a Mahomedan widow,

who was in possession of her husband's property in lieu of dower, had made a gift of the property in favour of her son.

The heirs sued for possession of their share after her death. They were met with the plea that they could not obtain possession without payment of the dower debt. They replied that the donee was the donee of the property and not of the dower debt, and therefore could be sued for possession. A learned Judge of this Court, after reviewing the authorities on the point, came to the conclusion that the gift by the widow being a gift of the property and not a gift of the dower debt, the donee could not resist the suit of the heirs. Assuming that the right of a Mahomedan widow to remain in possession of her husband's property in lieu of her dower is a transferable right which can only be transferred along with the dower debt, we think that on the language of the deeds of gift in this case, no such transfer of the dower debt or of the widow's right to remain in possession of her husband's property was made. The defendants appellants cannot, in our opinion, resist the present claim on the ground that the plaintiffs respondents should pay their proportionate share of the dower debt of Mt. Maina.

The last point urged on behalf of the appellants is about the rate of interest. In view of our finding that the plaintiffs are entitled to possession without payment, the question really need not be decided, but we think it better to express an opinion on the point raised. The question of the rate of interest was in issue between the present plaintiffs and Mt. Maina in the litigation of 1902 and was decided against Mt. Maina. The appellants derive their title through her and therefore they are bound by the findings arrived at in 1902, and even if the finding is not binding upon the appellants, we think that no case has been made out to make us differ from the lower Court and allow a higher rate of interest than 3 per cent per annum. The result is that the appeal fails and the decree of the first Court is upheld. We dismiss the appeal with costs, including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

(14) [1910] 32 All. 551=6 I. C. 376.

(15) A. I. R. 1914 All. 461=26 I. C. 109.

*** A. I. R. 1919 Allahabad 136**

WALLACH, J.

Jabruddin—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 379 of 1919, Decided on 30th July 1919, against order of Sess. Judge, Moradabad, D/- 14th June 1919.

(a) Criminal P. C. (1898), Ss. 110 and 439—Interference in revision against order under S. 110 is rarely made.

The High Court is not a Court of appeal for cases under S. 110 and it is only in very rare cases that it will interfere. [P 136 C 2]

(b) Criminal P. C. (1898), Ss. 110 and 117—Power is extensive but should be scrupulously used—Inadmissible evidence prejudicial to accused should not be allowed.

Section 110, Criminal P. C., coupled with S. 117 of the Code gives very extensive powers to Magistrates and should be administered with scrupulous care, and materials ought not to be brought on to the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused.

[P 136 C 2]

*(c) Criminal P. C. (1898), S. 117—Evidence that accused was suspected in certain crimes does not fall within meaning of "general repute"

Specific instances of crime in which the accused is suspected, are not good evidence and do not fall within the meaning of "general repute" under S. 117 because suspicion cannot take the place of proof that a man has committed an offence. Similarly, history sheets are not evidence, especially where the official who produces them is not himself responsible for all the entries thereon.

[P 137 C 1,2]

(d) Criminal P. C. (1898), S. 110—Reasons for disbelieving accused's witnesses should be given—It should not be lightly brushed aside.

Where a Court disbelieves the evidence adduced by an accused person it ought to record specific reasons for such disbelief the mere fact that, assuming the accused is guilty, it was easy for the accused to get witnesses of fairly good status to give evidence on his behalf, is no ground for disbelieving the witnesses.

[P 138 C 2]

Nehal Chand and *S. M. Sulaiman*—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—*Jabruddin*, the applicant in this revision, has been bound over for three years under S. 110, Criminal P. C., by a Magistrate of the first class in Moradabad and, on reference under S. 123, Criminal P. C., the learned Sessions Judge of Moradabad has confirmed this order. The applicant has come to this Court in revision, and I have been asked by his learned counsel to take into consideration the evidence which has been produced on behalf of the pro-

secution as well as that produced on behalf of his client. It has been remarked more than once by learned Judges of this Court that the High Court is not a Court of appeal for cases under S. 110, Criminal P. C. The responsibility of administering that section rests primarily with the District authorities. That section coupled with S. 117, Criminal P. C., gives very wide powers, and necessarily so, to the trying Magistrate and it is only in very rare cases that this Court interferes with his decision, when it has been upheld either on appeal by the District Magistrate or on reference, under S. 123, Criminal P. C., by the Sessions Judge. Seeing how extensive the powers of the trial Court are, it is all the more necessary that Magistrates ought to administer it with scrupulous care and ought not to allow materials to be brought on the record which are not legally admissible in evidence and which are liable, if on the record, to prejudice the accused before the Court.

In this case unfortunately we have materials on the record which the learned Assistant Government Advocate frankly admits are not admissible in evidence, according to the rulings of this Court by which I am bound. The learned Sessions Judge states that the applicant is apparently a man of some substance, has a considerable amount of cultivation and is also a money-lender. It appears that in October 1914 the applicant was acquitted in a dacoity case. On 6th November of the same year proceedings were instituted against him under S. 110, Criminal P. C. He was bound over by a Magistrate of the first class on 19th December 1914, but the learned Sessions Judge, to whom the proceedings were referred for confirmation under S. 123, Criminal P. C., came to the conclusion that the applicant should not have been bound over and discharged the order which had been passed against him. The learned Sessions Judge, from whose order this revision has been filed, says that there are two parties in the village where the accused resides, one of them being headed by Muhammad Zahur and the other by the accused, that these two parties are hostile to each other and that many of the prosecution witnesses seem to be connected with Muhammad Zahur. This is a further reason why the evidence for the prosecution has to

be carefully scrutinized. There is on the record a certified copy of a complaint, dated 31st January 1919, by the present applicant charging Muhammad Zahur, of an offence punishable under S. 323, I. P. C. It does not appear what the result of those proceedings was, but very few days after, namely, on 5th February 1919, the applicant was arrested on a charge under S. 397, I. P. C. There appear to have been two dacoities at Mahe-shpur and Bhawanipur. The applicant was not named as having participated in either of them, but some time in the month of February he was identified with reference to both the dacoities by one witness regarding each of these two dacoities. This was apparently all the evidence that the police secured against the applicant, because we find that they dropped the charges under S. 397, I. P. C., against him and, in lieu of those, instituted proceedings on 1st March under S. 110, Criminal P. C. These resulted in an order, dated 16th May 1919, binding him over for three years. This order was confirmed by the Sessions Judge on 14th June 1919. Against these orders the present revision has been filed. The learned Sessions Judge says that the chief point for the prosecution is that the accused was identified, as already mentioned by me, having taken part in two dacoities. The two persons who identified him, were prosecution witnesses in this case. Then the learned Sessions Judge proceeds:

"Most of the other witnesses refer to him as having been suspected in these or other dacoities of recent occurrence, but the reason they give for their suspicions is that he was mentioned to them by the complainants. The complainants usually say that they did not mention their suspicions to anybody."

In the case of *Raham Ali v. Emperor* (1) Rafique, J., has held that specific instances of crime in which the applicant was suspected were not good evidence and could not be said to fall within the meaning of "general repute" under S. 117, Criminal P. C. The same view was also taken by Chamier, J., in *Bechai v. Emperor* (2). Chamier, J., says:

"The so-called evidence which is supposed to connect him with various offences consists of (1) Policelists of cases in which he is said to have come under suspicion, (2) the statements of witnesses each of whom says that he suspected the applicant of complicity in this or that iso-

lated offence, (3) a list of cases in which the applicant's house has been searched on suspicion that he had committed some offence. Police lists of the kind here referred to have been repeatedly held to be inadmissible and suspicion cannot take the place of proof that a man has committed an offence."

In the case with which I am dealing in revision, the learned Sessions Judge observes as follows:

"It should be noted that the accused has been recorded on a history sheet as a dacoit for some years."

History sheets are not evidence against the accused. This history sheet was produced by an official who is not himself responsible for all the entries on the history-sheet and it was a piece of paper of the kind which was held by Chamier, J., not to be evidence in a S. 110 case. In my opinion therefore a considerable amount of inadmissible evidence has been allowed to be brought on the record by the trial Magistrate, and having regard to the evidence given, I am of opinion that this inadmissible material has seriously prejudiced the applicant.

To satisfy myself as to whether the admissible evidence on the record is sufficient to justify an order under S. 110, Criminal P. C., I have gone through the evidence of the witnesses for the prosecution. Almost throughout the evidence I find such a quantity of inadmissible material in the statements of witnesses that I am not prepared to say that that evidence is sufficient when contrasted with the evidence produced on behalf of the defence. Regarding the defence evidence the learned Sessions Judge says:

"It is true that of the witnesses for the defence many are of higher status than those for the prosecution, but a man of the position of the accused has usually little difficulty in procuring witnesses to speak for him and the defence witnesses are not in a position to know much about his real character."

I fail to see why the learned Judge says that the defence witnesses are not likely to know much of the applicant's character. They are in as good a position to know of the applicant's real character as many of the prosecution witnesses were. The reason here suggested by the trying Magistrate for discrediting those defence witnesses, who were of a higher status than the prosecution witnesses, was that a man of his position, that is a man who had the assistance of badmashes at his back, would

(1) [1913] 20 I. C. 231.

(2) A. I. R. 1914 All. 280=26 I. C. 153.

find little difficulty in procuring witnesses to speak for him. In the words of Richards, C. J., in the case of *Miharban Singh v. Emperor* (3), it seems to me that the Magistrate disbelieved the evidence adduced by the accused because he had decided before hearing them that he was guilty. That is not a fair way of dealing with the evidence of the witnesses for the defence. Specific reasons should have been given for disbelieving them and not merely the reason that, assuming that the accused was guilty, it was easy for him to get witnesses of fairly good status to give evidence on his behalf. In my opinion the Courts below did not proceed to the consideration of the case from the proper point of view, and, for the reasons already stated, I think the order ought to be set aside. I accordingly allow the application in revision, set aside the orders of both Courts below and direct that the applicant's bail bond be cancelled.

V.B./R.K. *Application allowed.*

(3) A. I. R. 1915 All. 464=31 I. C. 821.

A. I. R. 1919 Allahabad 138

RAFIQUE AND LINDSAY, JJ.

Gulzari Lal—Plaintiff—Appellant.

v.

Aziz Fatima and others—Defendants—Respondents.

First Appeal No. 14 of 1917, Decided on 22nd January 1919, from decree of Sub-Judge, Aligarh.

Transfer of Property Act (1882), S. 92—Subrogation—Money borrowed used in paying off previous charge—Right to subrogation depends on agreement.

The mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to this benefit depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed having regard to the circumstances of the transaction, and this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditors.

[P 139 C 2]

Radha Kant Malaviya—for Appellant.

* *Ishaq Khan, Jogindro Nath Mukerji and Iqbal Ahmad*—for Respondents.

Judgment.—The appellant here, Babu Gulzari Lal, was the plaintiff in the Court below in a suit brought for the recovery of mortgage money alleged to be due to him in respect of two mortgages executed in his favour on 22nd March 1911 by one Sayid Ali Ahsan. The mortgage transac-

tion was cast in the form of zar-i-peshgi leases and the mortgage money was Rs. 6,000. The property comprised in the mortgage consisted of a certain zamindari share of the mortgagor's situate in a village called Kura Mai and also a house situate in the town of Marchra. Defendant 1 in the suit was the mortgagor, Ali Ahsan, and in addition to him there were 18 other defendants who were represented to have interests of one kind or another in the property mortgaged. The suit, as we have said, was a suit for sale, but the claim was not merely for sale of the property mortgaged under these documents of 22nd March 1911. There was in addition a claim to bring to sale certain other property which had been mortgaged under two documents, dated respectively 29th July 1907 and 1st September 1908. The plaintiff alleged that these two latter mortgages had been paid off by him; that he was entitled accordingly to the benefit of these mortgage securities, and could therefore call upon the Court to bring the properties affected by them to sale.

Before proceeding to discuss the matters which arose for decision in the Court below, it is necessary to say a few words regarding a suit which was brought in the Court of the Assistant Judge of Aligarh in the year 1911 just after the mortgages now in suit had been executed in the plaintiff's favour. Defendant 2, namely Mt. Aziz Fatima, brought a suit against Babu Gulzari Lal and his mortgagor, Ali Ahsan, for specific performance of a contract of mortgage. In this suit Aziz Fatima alleged that Ali Ahsan had, on 17th March 1911, contracted to give her a zar-i-peshgi lease of Mauza Kura Mai. She alleged that the agreement had been completed by the tender and acceptance of earnest money, and she went on to say that on 22nd March 1911, the mortgagor, Ali Ahsan, had fraudulently executed two documents of mortgage (zar-i-peshgi leases) in favour of Gulzari Lal. Her allegation was that this was a collusive transaction which Ali Ahsan and Gulzari Lal had entered into for the purpose of defeating her rights. She claimed that at the time Gulzari Lal took these transfers from Ali Ahsan, he was well aware of the previous agreement of Ali Ahsan to execute a mortgage in her favour. Accordingly she claimed specific performance of the agreement of 17th March

1911 and also a declaration that the transfers which had been made in favour of Gulzari Lal on 22nd March 1911 were void and not binding upon her.

The lady's claim was decreed in the Court of first instance. The defendant, Ali Ahsan, was directed to execute a zar-i-peshgi lease in favour of the lady according to the terms of the draft which was filed, and it was further declared that the documents executed in favour of Gulzari Lal on 22nd March 1911 were void as against Aziz Fatima. This decree was upheld in appeal by a Bench of this Court in a judgment, dated 28th July 1913. The result of this litigation therefore was that the document of mortgage which Ali Ahsan had contracted to execute in favour of Aziz Fatima was executed under the order of the Court in her favour. Now we have the present suit brought by Gulzari Lal on the strength of the documents of 22nd March 1911. Various defences were put forward by the various defendants who were impleaded, but it will not be necessary for us to refer to all the pleas taken in defence, but only to such of them as are necessary to be mentioned for the purpose of disposing of the single point which has to be decided in this appeal.

We note that in the Court below it was found that the total consideration for the bond in suit which passed was Rs. 5,120 only and we also note that a decree was given to the plaintiff for this sum together with interest according to the terms of the documents. The total sum for which sale was ordered was Rs. 6,868 and the lower Court directed the property situate in Mouza Kura Mai and the house situate in Marchra, to be sold subject to the prior rights of the defendants 2 to 9. The lower Court refused to order the sale of the other properties mentioned in the schedule attached to the plaint, in other words, the properties which though not mortgaged to the plaintiff by the deeds of 22nd March 1911 had been mortgaged under the two documents dated 29th July 1907 and 1st September 1908 in favour of other persons. These mortgages, as we have said, the plaintiff claimed to have redeemed and it was for this reason that he sought to have them sold in satisfaction of his claim. The learned Judge of the Court below held that the plaintiff was not entitled to the benefit of subrogation in respect

of these two deeds which he had redeemed and it was for this reason that the claim to have these properties brought to sale was dismissed.

The plaintiff comes here in appeal and it is argued that by reason of his having satisfied the debts due on the two bonds mentioned above, namely, those of 29th July 1907 and 1st September 1908, he was entitled to priority against Aziz Fatima in respect of the mortgage which was executed in her favour under the order of the Court and also against the other defendants who are lessees and transferees of portions of the mortgaged property. In dealing with this question of the right of the plaintiff to be subrogated to the rights of the prior creditors whom he had paid off, the learned Judge of the Court below referred to a decision of this Court reported in the case of *Umrai Lal v. Rukmin Kuar* (1), and in particular, to certain remarks which are to be found at p. 960 (of 14 A. L. J.) of the report. It was there laid down that

"the mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit just mentioned depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed having regard to the circumstances of the transaction, and this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditors."

It is not shown in the present case that the documents which were executed in the plaintiff's favour on 22nd March 1911 contained any express contract between the borrower and the lender by which the latter was to be subrogated to the benefits of the earlier securities which were to be paid off. The question therefore which the Court below had to determine was whether in the circumstances of the transaction which took place on the date above mentioned between Ali Ahsan and Gulzari Lal, there was anything from which an agreement entitling Gulzari Lal to the benefit of the earlier securities might be implied. The Subordinate Judge points out the very facts which to his way of thinking tend to the conclusion that there was no such agreement between the parties. One fact it may be mentioned is of special importance and that is that certain items

(1) [1916] 35 I. C. 647.

of property which were hypothecated in the earlier deeds were not included in the mortgage executed in favour of Gulzari Lal. Thus in the deed of July 1907 we find that in addition to the property situate in village Kura Mai other items of property situate in the villages of Ratanpur, Umarpur and Kasimpur had been mortgaged. These properties were not included in the bonds executed in Gulzari Lal's favour. Further it is evident from the result of the litigation between Aziz Fatima and Gulzari Lal that as against the former these documents, upon which the plaintiff is now suing, were declared to be totally void and this point being settled, it seems to us impossible for the plaintiff in the present suit to argue that by reason of having discharged these prior bonds he is entitled to any priority against the lady. He can only justify or seek to justify the discharge of these prior encumbrances on the ground that a mortgage was executed in his favour on 22nd March 1911; but if that mortgage has been declared to be void and of no effect against Aziz Fatima, it is obvious that Gulzari Lal cannot as against the lady, claim any benefit in the way of priority. We think therefore that the Court below was right.

As regards the other defendants against whom it is argued here that priority should have been allowed, namely, defendants 3 to 9 and defendants 13, 14, 15, 16 and 19, we are satisfied that the decision of the Court below is also correct. There can be no doubt that the transaction which took place between Ali Ahsan and the plaintiff Gulzari Lal on 22nd March 1911 was in substance a fraudulent transaction and entered into for the purpose of defeating the rights of Aziz Fatima. The existence of the previous agreement between Ali Ahsan and Aziz Fatima was well known to Gulzari Lal at the time and the fact that payments, in discharge of the prior mortgages, were made one on the very day of the mortgage, namely, 22nd March 1911, and the other on the following day, goes to show that Gulzari Lal was not acting bona fide but was attempting under colour of the mortgages made in his favour to secure an advantage over Aziz Fatima and others, to which he knew perfectly well he was not entitled. It has been argued before us that the question of

bona fides does not arise and that it has been held in at least one ruling of the Madras High Court, that a payment which has not been made bona fide may entitle the person to the benefit of subrogation. That case is *Syamalarayudu v. Subbarayudu* (2). It has not been argued before us that the statement of the law contained in the case of *Umrai Lal v. Rukmin Kuar* (1) is in any way erroneous. It is obvious that there was no express agreement between the lender and the borrower that the former was to have the benefit of subrogation, and we are unable to find in the plaintiff's favour that there were any circumstances which would entitle us to assume that such an agreement was entered into between the parties. Gulzari Lal cannot claim that merely by his having paid off the snms which were due on these two earlier deeds, he is entitled to claim priority over the transferees of subsequent date. We have already mentioned that in the suit which was brought for specific performance it was found that the whole transaction between Gulzari Lal and Ali Ahsan was collusive and fraudulent, and we think the proper view to take is that even if it could be assumed that there was any agreement made between the parties which is not entered in the deeds, Gulzari Lal cannot be allowed to derive any benefit out of his own fraud. The decision of the Court below appears to us to be perfectly correct and we see no reason to interfere with it. No other ground of appeal has been argued before us and the result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(2) [1898] 21 Mad. 113.

A. I. R. 1919 Allahabad 140

RAFIQUE AND PIGGOTT, JJ.

Rupan Rai and others—Defendants—Appellants.

v.

Subkaran Rai and others—Plaintiffs—Respondents.

Second Appeal No. 1667 of 1916, Decided on 15th November 1918, from decree of Dist. Judge, Ghazipur.

(a) **Hindu Law—Partition—Suit for declaration and ascertainment of share in property belonging to the joint family dissolves status of joint family membership.**

The presentation of a plaint asking the Court to ascertain and to declare the share of the plain-

tiffs in property which had formerly belonged to a joint family of which the plaintiffs and the defendants were members, dissolves the status of joint family membership as between the parties to the litigation. [P 142 C 1]

(b) Civil P. C. (1908), S. 54 and O. 20, R. 18 (1) — Joint family property consisting of land assessed to revenue—Suit for partition is governed by S. 54 and O. 20. R. 18 (1)—Suit for declaration of plaintiff's share in such property without asking for partition is not barred by Specific Relief Act (1877), S. 42, Proviso.

Where the whole of the property of a joint family is land assessed to revenue, a suit for the partition of such property would be governed by the provisions of S. 54 and O. 20, R. 18, Cl. (1). All that the civil Court could do in respect of such property would be to ascertain the share of the plaintiffs and to give them a decree declaring the amount of that share as against the defendants, leaving the plaintiffs to take any steps they might think proper for the actual partition of their share in the Revenue Court, in accordance with law as laid down by S. 54. Therefore a suit for a declaration of the plaintiffs' share in such property without asking for partition is not barred by the proviso to S. 42, Specific Act.

[P 142 C 1]

Haribans Shahai and Tej Bahadur Sapru—for Appellants.

M. L. Agarwala and Uma Shankar Bajpai—for Respondents.

Judgment. — The plaintiffs in this case alleged that they were joint owners along with the defendants of certain property, specified in the plaint itself, and that the extent of their share was two-fifths of the whole. They sought a declaration of their title and of the extent of their share. The suit was resisted upon various pleas. On the merits, the principal point taken by the defendants was this, that the joint family of which they themselves and the plaintiffs had at one time been members had broken up long before the institution of the suit, that all the joint family property had been divided amongst the members of the family, that the plaintiffs were not the owners of a two-fifths share in each of the properties specified in the plaint, but were only the owners of a smaller share in some of the said properties, according to the records in the village papers. Various issues were framed in the Court of first instance, but the learned Subordinate Judge tried only the main issue of fact. He found in favour of the defendants, that there had been, long prior to the institution of the suit, a complete division of the joint family property between the members of the said family and that the plaintiffs were not the owners

of the two-fifths share in each of the properties specified in the plaint which they claimed.

On these findings he naturally dismissed the suit. In appeal the learned District Judge has found that there had never been any partition of the joint family property as between the plaintiffs and the defendants, that the properties in suit, as specified in the plaint, belonged to the joint family, that the plaintiffs on the date of the institution of the suit were jointly in possession of the same along with the defendants and that the share which the plaintiffs would be entitled to take on partition in each of these items of property was two-fifths. Upon these findings he has given the plaintiffs a decree for a declaration as sought by them. In the memorandum of appeal before us there is a plea assailing the findings of fact recorded by the learned District Judge, but this could not be pressed. There remains two pleas. The first of these is based upon an interpretation which the defendants-appellants ask us to put upon the judgment of the lower appellate Court. The suggestion is that the learned District Judge has found that all the parties to this suit, plaintiffs and defendants, were and continued to be up to the date of his decree members of a joint undivided Hindu family. Upon this, the plea is taken that no single member of a joint undivided Hindu family can be said to be the owner of any specified share in any one item of the property belonging to the family. As a proposition of law this is perfectly correct, but we do not think that the learned District Judge has found, or intended to find, what the appellants assert.

Our attention has been drawn to the wording of the plaint. It must be said that the plaintiffs themselves have not made it as clear as they ought to have done whether or not it was their case that the status of joint family membership as between them and the defendants had come to an end prior to the institution of the suit, or was ended by the institution of the suit itself, that is, by the presentation of this plaint. If however the defendants considered that they were put to a difficulty in meeting the plaintiffs' suit by reason of any vagueness of pleading on the part of the plaintiffs, they could have asked the trial Court to insist upon such amendment of

those pleadings as would clear up any doubtful point. In any case it is quite clear that the presentation of a plaint of this sort, asking the Court to ascertain and to declare the share of the plaintiffs in property which had formerly belonged to a joint family of which the plaintiffs and the defendants were members, would dissolve the status of joint family membership as between the parties to the litigation. There is therefore no force in the first plea of this memorandum of appeal. The second plea, as taken, is to the effect that the suit is obnoxious to the provisions of S. 42, Specific Relief Act (1 of 1877), because the plaintiffs could have sought a further relief, by way of partition of what they alleged to be the joint family property. At a first glance there seems to be a good deal of force in this argument. We must however note to begin with that nothing was said about S. 42, Specific Relief Act, in the pleadings in either of the Courts below. Secondly, it has been pointed out to us on behalf of the plaintiffs-respondents that the whole of the property in suit is landed property assessed to revenue.

A suit for the partition of this property would therefore be governed by the provisions of O. 20, R. 18, Cl. 1, and S. 54 Civil P. C. Although therefore upon a suit for the partition of this property the decree passed might have been required to be somewhat differently worded so as to be brought into strict conformity with the rule already referred to, it is clear that all that the civil Court could do in respect of this particular property would be to ascertain the share of the plaintiffs and to give them a decree declaring the amount of that share as against the defendants, leaving the plaintiffs to take any steps they might think proper for the actual partition of their share in the Revenue Court, in accordance with law, as laid down by S. 54 Civil P. C. We think therefore that there is no real substance in this plea and that we ought not to give any effect to it at this stage. It has also been contended before us, although the point is not taken in the memorandum of appeal, that if we were to deal with this suit as in substance a suit for partition of joint family property, we ought to consider whether there remains any other property belonging to the joint family which has not been brought into the suit. There

was no plea to this effect in either of the Courts below and, as a matter of fact, the position taken up by the defendants there was hopelessly inconsistent with any such plea.

While fully admitting the principle of law pressed upon us on behalf of the appellants, we can only say that there are no materials before us to justify our finding that there is any other property belonging to the joint family of which the parties to this suit were formerly members which has not been made the subject-matter of this litigation. The appeal therefore fails upon all grounds and we dismiss it with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 142

RICHARDS, C. J. AND BANERJI, J.

Narsingh Das—Plaintiff—Appellant.

v.

Sada Ram and others—Defendants—Respondents.

First Appeal No. 354 of 1916, Decided on 16th January 1919, from a decree of Offg. 2nd Addl. Sub-Judge, Aligarh.

Tort—Defamation—False imputation of improper conduct creates liability—For plea of privilege defendant must prove that information was reliable and that he honestly believed it to be true.

Defendant wrote and posted a letter in which he stated that at the plaintiff's instigation the betrothal of a certain girl belonging to the brotherhood had been broken off and the girl had been married to some other person. It was found that such conduct was considered very improper by the members of the brotherhood and that the charge made by the defendant was false and was made out of ill-will:

Held: (1) that the statement made by the defendant in his letter amounted to defamation and that he was liable to pay damages to the plaintiff. [P 144 C 1]

(2) that if the defendant had proved that he as a member of the brotherhood received information of a reliable kind which he honestly believed to be true, and that he merely wrote the letter for the purpose of giving information to the brotherhood in order that the matter might be investigated, a plea of privilege might have been sustained. [P 144 C 1]

Peary Lal Banerji and Lakshmi Narain—for Appellant.

B. E. O'Connor for *Biddhi Chand* and *Meghraj*—for Respondents.

Judgment.—This appeal arises out of a suit for libel. The alleged libel is contained in a letter admittedly written by the defendant, Sada Ram. A translation will be found at p. 49-A and is in the following words:

"Our compliments to you. We pray God to protect you and ourselves. Bai Sardari died on Maghsar Sudi 9th. We informed you of it in a previous postcard which we trust you have received. The son of Bhikam Das (son of Net Ram) of Aligarh has been betrothed to the girl at Sikandra. The girl of Sikandra came and she was accompanied by the Gomashtha of brother Narsingh. Mahesh Das caused her to be married in the family of a Chandak of Bhongra. Please inform Bhikam Das of it. We promised to pay Rs. 100 to the State employees provided they did not let the marriage to be celebrated, but Mahesh Das paid a larger amount and consequently the marriage could not but be held. We did not receive any letter from Bhikam Das. Other persons of Gandhi's Bas (name of locality) here came to us and it was from them that we came to know about the betrothal. Subsequently we inquired from Kundan Lal, Chanak, and he too told us that the betrothal took place. Such high-handedness has been practised here. Please inform the members of the brotherhood and see if there is any remedy now. The state of affairs here is hopeless and you must note this. We write the above for your information. Please also inform Bhikam Das. There is nothing more to pen. We shall write more on hearing from you. Please keep sending letters to us. In this affair there appears to be an instigation by Narsingh Das."

The sentence "such high-handedness has been practised here" has also been translated as: "A horrible thing has been practised here." The sentence "In this affair there appears to be an instigation by Narsingh Das" has also been translated: "In this affair there appears to be the advice of Narsingh Das." For reasons which we shall state hereafter we do not think that there is any material importance in the different translations. The first question to be considered is whether or not the letter (quoted above), assuming it to have been written and published by the defendant Sada Ram, is defamatory. There is sworn evidence, which we see no reason to disbelieve, that the breaking off of a match where the girl has already been betrothed and marrying her to some one else is considered a very discreditable and improper thing amongst the members of the caste to which the parties belong. There are on the record documents which show that some years ago the breaking off of a match in this way was visited with very substantial penalties by the panchayet of the brotherhood. Sada Ram himself in para. 5 of his written statement (a paragraph which apparently was intended to suggest privilege) states as follows:

"According to the custom observed by the

members of the brotherhood it is bad to break off one betrothal and to enter into a new one."

The translation of the word "bad" does not sufficiently represent the meaning of the expression as contained in the vernacular. It is clear that the vernacular means that it is a very improper proceeding. It would seem therefore that if the letter means that the plaintiff had taken part in the breaking off of the match between the son of Bhikam Das and the girl at Sikandra, it was imputing to the plaintiff that he was a participator in a matter which the caste considered to be most improper and highly reprehensive. Reading the letter as a whole we have not the slightest hesitation in saying that the defendant Sada Ram imputed to the Narsingh Das mentioned in the letter that he had been guilty of such an act. It will be seen that in the earlier part of the letter the writer says that the girl, when she was going to contract the second marriage, was accompanied by the gomashtha of "brother Narsingh Das." The gomashtha's name is not mentioned, and it is clear that the sting of the sentence is the statement that it was the gomashtha of Narsingh Das who went with the girl. If there was any ambiguity in this part of the letter, it is made clear by the concluding sentence, namely: "In this affair there appears to be the advice (or instigation) of Narsingh Das." The next question is whether the writer intended to refer in the latter to the plaintiff. The Court below has found that he did, and we have not the smallest hesitation in coming to the same conclusion. The defendant did not go into the witness box and was never examined as a witness in the case; but when he was examined before the hearing in a proceeding of the Court, he admitted that the only Narsingh Das whom he knew was the plaintiff. He never stated (as a witness) that he meant any person else. It is unnecessary to enlarge upon this matter; because as we have said before we have not the smallest hesitation in agreeing with the Court below that the defendant referred to the plaintiff when he wrote the letter.

The next question to be considered is whether or not the defendant Sada Ram published the letter. When he was examined in "proceeding" previous to the trial he admitted that he wrote the

letter but he said that after writing it he changed his mind and did not send it. The Court below in a somewhat inconsistent judgment has come to the conclusion that Sada Ram wrote the letter and sent it by post to the party to whom it was addressed, namely, the defendant Bidhi Chand. If this conclusion be correct it is clear that there was a publication. We also agree with the Court below so far, that we believe that the letter was sent to Bidhi Chand by the defendant Sada Ram.

The defendant in para. 5 of his written statement seems to suggest a plea of privilege. No doubt if the defendant had proved that he, as a member of the brotherhood received information of a reliable kind which he honestly believed to be true, and that he merely wrote the letter for the purpose of giving information to the brotherhood in order that the matter might be investigated, a plea of privilege might be sustained. In the present case however no attempt whatever was made to prove that the plaintiff had taken any part in the breaking off of any marriage, nor was any evidence given to show that the defendant Sada Ram had received information concerning the plaintiff's action which he honestly believed to be true. On the contrary there is the clearest evidence that there was ill-will between the plaintiff and the defendant and that some years ago a house which the defendant Sada Ram had constructed was pulled down as the result of the direct or indirect action of the plaintiff. In our opinion no proper plea of privilege was pleaded and certainly no facts were proved by the defendant which could sustain a plea of privilege even if it had been pleaded. The result is that as between the plaintiff and this defendant, the defendant is proved to have written and published a letter containing serious implications against the plaintiff and it would seem to us that upon the finding arrived at by the Court below itself it ought certainly to have given a decree for damages against Sada Ram.

As against Bidhi Chand the case does not stand on the same footing. This was the person to whom the letter was addressed and who in the opinion of the Court below duly received the letter. A witness called Narain Das was examined, and he proved that Bidhi Chand gave him

the letter stating that it was a very "horrible" thing. He goes on to state that Bidhi Chand said to him that Narsingh Das, that is the plaintiff, had sent the girl who had been previously betrothed and got her married to another person. The witness did not in his direct evidence make any further allegation against Bidhi Chand as a publisher of the defamatory allegations against the plaintiff. The learned Judge made some very sweeping remarks about the plaintiff's evidence and the evidence of the plaintiff's witnesses; but he certainly does not say anything definite against Narain Das. It is quite clear that Sada Ram wrote his letter with the intention of sending it by post to Bidhi Chand. He has never come into the witness-box to say that he did not send the letter, and therefore, there was every probability that the letter was received by Bidhi Chand. If Bidhi Chand received the letter, it would not be at all improbable that he would show the letter to Narain Das who was a member of the brotherhood, and assuming that Bidhi Chand believed the allegations in the letter to be true there would be nothing unnatural or even reprehensive in his having said to Narain Das that it was a "horrible thing." This would only mean that assuming the allegations were true it was a horrible thing for Narsingh Das to have done. However if Bidhi Chand showed the letter to Narain Das, this would amount to a publication. Narain Das says that Bidhi Chand handed the letter over to him. Narain Das has produced the letter in Court, and the evidence of Narain Das coupled with the evidence of the plaintiff is the only explanation we have of how the letter came to be at Aligarh.

Sada Ram does not reside in Aligarh but lives at Pohkaran in the Jodhpore territory. We see no reason why the evidence of Narain Das should not be believed. Previous to the institution of the suit the plaintiff caused a written notice to be given to Sada Ram, in which he clearly and distinctly set forth his complaint that a false statement had been made by Sada Ram in the letter addressed to Bidhi Chand, and he called upon Sada Ram to publicly apologise for what he had done and to admit that the statements were not true, in which case the plaintiff said that he would not bring the suit, otherwise he would. Sada Ram and his son

Fakir Chand took no notice of this letter. No similar notice was served upon the defendant Bidhi Chand or his son. The plaintiff, it is true, alleges that he verbally gave a similar notice but we doubt very much that he did so. Had Bidhi Chand come into the witness-box and had he honestly admitted that he received the letter, as we believe he did, and stated that all that he had done was to hand over the letter to Narain Das as a member of the brotherhood to give the plaintiff an opportunity of denying charges, we think that in all probability the suit would never have been instituted against him at all. Unfortunately he did not adopt this course but on the contrary absolutely denied that he ever received the letter at all or had handed it over to Narain Das.

The learned Judge in the Court below, without giving any good reason for discrediting the evidence of Narain Das, which, as we have already said, was highly probable, has raised various hypotheses as to what was done with the letter. He says that it was possible that Bidhi Chand handed the letter over to Bhikam Das and that the plaintiff got it from Bhikam Das. There is no evidence on the record to support this; but even if it were true, the handing over of the letter to Bhikam Das would equally have been a publication and the obligation upon this defendant Bidhi Chand to honestly admit the receipt of the letter and tell the truth as to what he had done with it was just the same. We think that there ought to be a decree against Bidhi Chand also but for a far less amount than should be awarded against Sada Ram.

Meghraj is alleged to have repeated the defamation at a village called Mai in the Aligarh District. The evidence that he did so is supported by the evidence of one Kewal Ram who belongs to that village. Meghraj defendant says that he was not in the village at all but he admits that his wife and child were there. It certainly was probable that Meghraj did visit Mai (where his wife and child were); and if he went there it would be highly probable that he would repeat the story to members of the brotherhood at that place. However we do not feel justified in overruling the finding of the Court below with regard to this defendant. With regard to Fakir Chand, the son of Sada Ram, although the letter

was written by his father his name also appears on the letter. Furthermore when before the suit the plaintiff gave the written notice, Fakir Chand did not repudiate the writing of the letter and the making of the false statements. While therefore we think that no decree should be given against Fakir Chand we do not think that he ought to get costs against the plaintiff.

The only matter which remains to consider is the question of damages. As against Sada Ram we find that he made a false charge against the plaintiff, imputing to him participation, if not instigation, of very improper conduct. We also find that there was ill-feeling, in other words, what in legal language is understood as "malice." The plaintiff is a man of position and undoubtedly the making of these allegations against him would cause him a good deal of annoyance and was calculated to lower him in the eyes of his fellow castemen. The matter was made rather worse by the fact that there had been a previous attempt to charge the plaintiff with having taken part in a prior transaction of the same nature. The defendant Sada Ram, instead of taking advantage of the written notice served by the plaintiff, chose to disregard it. He had the audacity to put in a plea in his written statement that the Narsingh Das whom he referred to was not the plaintiff but another Narsingh Das, an allegation which in the opinion of the Court below, and in our opinion was wholly false. Under the circumstances we think that there should be substantial damages awarded to the plaintiff as against Sada Ram, at any rate a sum which will be a reasonable indemnification to the plaintiff for the costs and expenses which he must have incurred in bringing the present suit. The sum awarded against Bidhi Chand ought to be in our opinion a much smaller amount.

We allow the appeal set aside the decree of the Court below and grant the plaintiff a decree against the defendant Sada Ram for Rs. 1,500 with full costs in all Courts; by this we mean that he shall receive the full costs incurred in the Court below and in this Court, and not merely costs proportionate to the amount decreed. The plaintiff will also have a decree against the defendant Bidhi Chand for the sum of Rs. 100 and costs as if he had recovered a decree for this amount.

This will reply as to costs in both. We dismiss the suit as against the defendants Meghraj and Fakir Chand, but direct that they and the other defendants do bear their own costs in all Courts. Costs in this Court will include fees on the higher scale.

V.B./R.K. *Appeal allowed.*

A. I. R. 1919 Allahabad 146

TUDBALL, J.

Mahomed Ehtisham Ali—Defendant—Applicant.

v.

Lalji Singh and others—Plaintiffs—Opposite Parties.

Civil Revn. No. 43 of 1918, Decided on 3rd December 1918 from order of Asst. Collector, First Class, Azamgarh.

Agra Tenancy Act(1901), Ss. 167 and 199—Rent suit—Third person claiming entire rent as sole proprietor—Order directing claimant to establish title in civil Court—Revision does not lie.

Under S. 167, *prima facie* a revision does not lie to the High Court from an order of a Revenue Court. The remedy in the civil Court is by appeal only in cases in which an appeal is given.

[P 147 C 1]

Plaintiffs sued a tenant claiming to recover half the rent of the holding. The tenant pleaded that he had paid the whole of his rent to one *E*. Thereupon *E*, was added as a defendant and pleaded that he was entitled to the whole of the rent as sole proprietor. The Assistant Collector purporting to act under S. 199 directed *E* to institute a suit in the civil Court for the determination of the question of proprietary title which had been raised. *E* filed a revision in the High Court against the order of the Assistant Collector:

Held: that under the provisions of S. 167 no revision lay to the High Court. [P 148 C 1]

M. L. Agarwala and S. M. Sulaiman—for Applicant.

Harnandan Prasad for Iswar Saran and Mukhtar Ahmad—for Opposite Parties.

Judgment.—Revisions Nos. 43, 44, 45, 46, 47 and 48 are connected and arise out of six suits for rent which were brought in the Court of an Assistant Collector of the First Class. In No. 43 the applicant for revision here, Mahomed Ehtisham Ali, was an added defendant to the suit for rent brought by Lalji Singh and others against an agricultural tenant. The plaintiffs claimed to be entitled to recover half of the rent from the tenant. The tenant pleaded that he had paid the whole of his rent to Ehtisham Ali. On the plaintiffs' request Ehtisham Ali was made a defendant and he pleaded that he was the sole pro-

prietor and entitled to the whole of the rent. Thereupon the Assistant Collector, purporting to act under the provisions of S. 199, Tenancy Act, directed Ehtisham Ali to institute within three months a suit in the civil Court for the determination of the question of proprietary title which was raised. In the other five suits Ehtisham Ali was himself the plaintiff and in each case he sued to recover the whole of the rent. In each of these suits the other claimants were made defendants and they claimed that they were entitled to half of the rent and that Ehtisham Ali was only entitled to the other half. In each of these cases also the Assistant Collector purporting to act under the same section of the Tenancy Act, directed the plaintiff Ehtisham Ali to institute a similar suit in the civil Court for the determination of the question of proprietary title. Each of the five revisions now before me is directed to the upsetting of the order passed by the Assistant Collector.

A preliminary objection is taken that no revision can lie to this Court against the order of the Assistant Collector. Reliance is placed in the beginning on S. 115, Civil P. C., and it is pleaded that the Revenue Court is not subordinate to this Court and therefore S. 115 does not apply. Personally I do not think that there is much force in this contention but it is unnecessary to express any decided opinion in respect to it. It is next pleaded that in view of the language of S. 167, Tenancy Act, it is clear that the present revisions do not lie to this Court. My attention is called to the decisions of this Court in *Thakur Damber Singh v. Sri Kishun Das* (1), *Parbhu Narain Singh v. Harbans Lal* (2) and *Jumna Prasad v. Karan Singh* (3). The judgment in the first of these three cases covers the point before me. On p. 551 (of 3 C. L. J.) it runs as follows:

"There is an express provision in S. 167 of the Act that all suits and applications of the nature specified in Sch. 4 of the Act shall be heard and determined by the Revenue Courts and except in the way of appeal no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which a suit or application might be brought or made. This

(1) [1909] 31 All. 445=2 I. C. 377.

(2) [1915] 35 I. C. 279.

(3) [1918] 46 I. C. 333.

clearly shows that *prima facie* a revision does not lie to the High Court from an order of the Revenue Court. The remedy in the civil Court is by appeal only in cases in which an appeal is given."

It is true that the order that was sought to be revised in that case was one passed by an Assistant Collector on an application for execution of a decree but the Court clearly considered the meaning of S. 167, Tenancy Act and the meaning there applied to that section clearly covers the present case. In the second of these cases the orders sought to be revised had been passed by a District Judge and the chief question was whether in the circumstances of that case any application for revision could lie under S. 115, Civil P. C. On this point the two Judges who heard the case differed. At the same time one Judge clearly expressed his opinion as to the meaning of the last clause of S. 167, Tenancy Act, and he held clearly that that barred a revision to this Court. Walsh, J., only held that a revision would lie on the ground that the decision of the District Judge, having been given by way of an appeal from the Revenue Courts was the decision of a civil Court and therefore subject to revision and it almost necessarily follows from his decision that in a case like the present he would have agreed with his colleague in holding that no revision would lie to this Court. In the third case a single Judge of this Court held that even where the order was passed by a District Judge in a suit instituted in the Revenue Court no revision would lie to this Court. In that case a suit for ejectment was filed in the Revenue Court and the defendants raised a question of proprietary title. The suit was decreed by the Revenue Court and an appeal was preferred to the District Judge but was dismissed on the ground that no appeal lay to him. An application in revision was filed in this Court and the learned Judge held that no revision could lie to this Court. He considered the cases which I have already mentioned and came to the conclusion that there was no room for argument that power of revision to the High Court was given under the Tenancy Act. On behalf of the applicant attention is called to S. 193, Tenancy Act and it is pointed out that S. 115, Civil P. C., would apply to all suits and other pro-

ceedings under the Tenancy Act, so far as they are not inconsistent therewith, and it is urged that a revision to this Court is not inconsistent with the provisions of the Tenancy Act. It is pointed out that in cases which are not appealable under S. 177 of the Act to the District Judge a revision is given under S. 185 to the Board of Revenue. It is then urged that an appeal and a revision are really one and the same thing and that as appeals lie under S. 177 to the civil Court therefore there is nothing inconsistent in a revision also lying.

In the first place the terms "appeal" and "revision" have technical meanings which are well understood and they are clearly distinguished from each other in the Civil Procedure Code as well as in the Criminal Procedure Code and where the legislature uses the word "appeal" and not the word "revision," it must be deemed to have used that word in its ordinary and well understood meaning. It is argued that the words in S. 167 "except in the way of appeal" mean "except in the way of appeal or revision." The argument is ingenious but I am afraid that I cannot give way to it. The legislature must be presumed to have known the meanings of the words "appeal" and "revision" and where it says "except in the way of appeal" or it must be held to have meant what it said. The very Chapter No. 12 of the Tenancy Act, clearly distinguishes between appeals and revisions. A further argument is raised that S. 167 only covers all suits and applications of the nature specified in Sch. 4 and that the revision specified in Sch. 4 is a revision under S. 185 which lies only to the Board of Revenue in certain cases, namely, those in which no appeals lie under S. 177 to the District Judge. It is therefore argued that the section does not cover a revision in a case in which an appeal would lie under S. 177 to the District Judge. The unfortunate part of this argument is that S. 167 says:

"All suits and applications of the nature specified in Sch. 4 shall be heard and determined by the Revenue Courts."

The nature of revisions is alike whether they lie in the Civil, Criminal or Revenue Courts and the language really means that no such application as the present could lie because it is in the

nature of an application such as is contemplated by S. 185, Tenancy Act. I therefore fully agree with the rulings which I have already mentioned in so far as they are applicable to the circumstances of the present case. Here no appeal whatever has been preferred to the District Judge. The case has not gone into the civil Court at all and there is no order before me which could in any sense be deemed to be an order of a civil Court. The language of S. 167, Tenancy Act is fatal to the present application and I must therefore uphold the preliminary objection and hold that no revision would lie to this Court in the present case. The application for revision is therefore rejected. It must not be inferred from this that I consider the order passed by the Revenue Court to be a correct one. The application is rejected with costs.

V.B./R.K. *Application rejected.*

*** A. I. R. 1919 Allahabad 148**

RICHARDS, C. J. AND BANERJI, J.

Fazal Ahmad and another — Defendants—Appellants.

v.

Mt. Rahim Bibi and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 21 of 1916, Decided on 5th December 1917, from decision of Sub-Judge, Pilibhit, D/- 4th January 1916

*** (a) Mahomedan Law — Gift — Marzulmaut—Person suffering from consumption making gift at time when there was rapid increase in disease and deceased was in apprehension of death — Rule of marzulmaut held to apply to transaction.**

Where a man, who had been suffering from consumption for more than a year, made a gift of certain property in favour of his mother, and it was found that there had been a rapid increase in the disease about the time when the gift was made and that the deceased was under apprehension of the near approach of death.

Held: that the rule of marzulmaut applied to the transaction and that the gift, being in favour of an heir of the deceased, was altogether void. [P 152 C 2]

(b) Mahomedan Law — Gift — Marzulmaut.

The doctrine of marzulmaut is founded on the Koran, which ordains that the heirs must inherit. It does not apply to a sale. [P 152 C 2]

(c) Mahomedan Law — Gift — Marzulmaut—Wakf is valid to extent of one-third of estate.

A wakf created during marzulmaut is valid only to the extent of one-third of the entire estate of the deceased. [P 152 C 2]

(d) Mahomedan Law — Gift — Marzulmaut—Gift in favour of heir—Validity of

A gift made during marzulmaut in favour of one of the heirs of the deceased is altogether void. [P 152 C 2]

B. E. O'Connor, Sundar Lal and S. M. Sulaiman—for Appellants.

Tej Bahadur Sapru, Preo Nath Banerji and Iqbal Ahmed—for Respondents.

Judgment.—This and the connected appeals arise out of two suits which related to certain property, moveable and immovable, which belonged to Manzur Ahmad, who died on 2nd September 1912. Manzur Ahmad, although he had been married (four times it is stated), never had any children. His heirs were, first, Fazal Ahmad (his paternal uncle), secondly, his mother Mt. Rahim Bibi, and thirdly, his two widows Mt. Qamarunnissa and Mt. Jilani Begam. Under the Mahomedan law of inheritance Fazal Ahmad would have been entitled to 10 sihams out of 24, Rahim Bibi to 8 sihams and the two widows to 6 sihams between them. Fazal Ahmad was not only uncle to the deceased but he was also the father of Mt. Jalani Begam, his youngest wife. Before his death Manzur Ahmad was possessed of a considerable amount of property. He had deposited in the house of Lala Khub Chand (banker) the sum of Rs. 16,876. He had also in cash in his house the sum of Rs. 8,500 and 4,000 sovereigns (equal to Rs. 60,000) which was buried in a house which was occupied by Jilani Begam. He had also Rs. 58,000 on fixed deposit with the Allahabad Bank. Besides this cash, the deceased was possessed of some house property and a considerable amount of zemindari property, including two villages called Mauza Bithaura Kalan and Mauza Amkhera. These two villages were worth about two lakhs of rupees. The property of the deceased was worth probably between five and six lakhs (if jewellery, ornaments, etc., be included).

Very shortly before his death, Manzur Ahmad had transferred the two last mentioned villages to his mother Mt. Rahim Bibi. He had also given her the 4,000 sovereigns. He caused the Rs. 16,876 deposited with Lala Khub Chand to be transferred to her name. The Rs. 8,500 in cash had also been brought to the house of Lala Khub Chand and placed to the credit of Mt. Rahim Bibi. It thus appears that the deceased transferred, very shortly before his death, property

and money to the extent of Rs. 2,85,376. After the death of Manzur Ahmad there was litigation in the Revenue Court as to mutation of names with regard to the two villages to which we have referred, with the result that Fazal Ahmad succeeded in having his name recorded as one of the heirs of Manzur Ahmad, and he was appointed lambardar. This suit was thereupon instituted in the civil Court and Mt. Rahim Bibi claims against the other heirs that she is entitled to the villages by virtue of a deed, dated 29th August 1912. In the other suit Fazal Anmed is plaintiff and seeks therein (amongst other things) his share of the four thousand sovereigns, of Rs. 16,876 and of Rs. 8,500.

The defendants in the suit brought by Rahim Bibi pleaded (1) that Manzur Ahmad was so ill that he knew nothing about the transfer at all, (2) that if he was capable of understanding the transaction, it was in truth and in fact a gift and that the gift being to an heir was void, having regard to the Mahomedan law of marzulmaut. Rahim Bibi answered these pleas by contending: (1) that the transaction was not a gift but a sale, in which case marzulmaut did not apply, (2) that having regard to the nature of the illness which was long protracted, the doctrine of "marzulmaut" did not apply, and (3) that even if the doctrine of marzulmaut did apply, the transaction was a wakf and was valid to the extent of one-third of the entire property of Manzur Ahmad. In answer to the suit brought by Fazal Ahmad, Rahim Bibi pleaded that the gift of the money was valid because marzulmaut did not apply and that the money was transferred not as a gift but in discharge of a debt due by the deceased to her.

Both suits were tried together upon the same evidence. We have come to the conclusion, for reasons which we shall state later on, that the transfers of the villages and of the money, etc., to Rahim Bibi were in truth and in fact gifts to Rahim Bibi, made by the deceased because he wished to benefit her more than his other heirs. In this view of the case, the all-important issue is whether or not the illness of Manzur Ahmad was such as to render the gifts void according to Mahomedan law that gifts made in marzulmaut are invalid,

Rahim Bibi has since Manzur Ahmad's death attempted to make a wakf of the property (perhaps more or less illusory) and she has given away most of the money to her own relatives who are not heirs of Manzur Ahmad. We may mention here that the learned counsel for Fazal Ahmad in the appeal before us abandoned the contention that the deceased did not know and understand what he was doing when he made the transfer and learned counsel laid no stress on the evidence of Fazal Ahmad or his witness.

We propose in the first place, to deal with the evidence relating to the illness of Manzur Ahmad. He was a man of vicious habits. He lived at a place called Dhundru, about six miles from Pilibhit. Dr. Nil Ratan Banerji was Civil Surgeon at Pilibhit in the year 1909, and in that year Manzur Ahmad was treated by him. Manzur Ahmad was then suffering from urinal complaints due to venereal disease. Dr. Banerji operated but the operation was not altogether successful. Some of the urine continued to come through the wound instead of the natural channel. The deceased continued to suffer from fistula but he was much better and he dedicated some property as a thank offering for his recovery, (making himself however the muttawali). In 1912 Dr. Banerji was transferred to Bara Banki (a long way from Pilibhit) but the deceased came to him on 26th June 1912 and remained under the doctor's care till 7th August preceding his death. Deceased was then suffering from an abscess or fistula in the anus and consumption had commenced. Dr. Banerji later in his evidence says that consumption had clearly developed. Dr. Banerji again operated and the wound caused by the abscess in the anus had nearly healed, but not quite when the deceased returned home on 7th August. Between 26th June and 7th August consumption made rapid progress; and when the deceased left for home, the second stage of the disease had almost passed. The doctor says "when I sent off Manzur Ahmad from Bara Banki his case was hopeless." The doctor says that he had not impressed upon Manzur that he would not recover but "he (the deceased) had come to understand that he would not recover." When he went to Pilibhit from Bara Banki he was hopeless of his reco-

very. "He could not get up himself. He required assistance to rise or to sit."

Dr. Banerji gave Manzur Ahmad when he was leaving, a certificate, stating that he was not suffering from any contagious or infectious disease. The doctor gave him this certificate so that he might not be troubled on the journey by reason of the authorities thinking he was suffering from plague or some such disease. Dr. Banerji was a witness for Rahim Bibi. He appears to have given his evidence in a straightforward manner, and we consider that reliance may safely be placed upon what he says.

From Bara Banki Manzur Ahmad proceeded to Pilibhit, a journey of about 10 hours in the train. At Pilibhit he stopped for a few hours at the house of Alauddin a brother of Rahim Bibi, and thence he proceeded to his own house at Dhundru, a journey of about six miles. Within a few days he suffered from a pain in his side, and he sent for another doctor who was then Civil Surgeon at Pilibhit, named Baldeo Singh. Even before Manzur Ahmad left Bara Banki, he had felt this pain and complained of it to Dr. Banerji. Dr. Baldeo Singh considered that he had an abscess near the kidneys, but he was not very certain about the locality. He advised to come in to Pilibhit to be operated upon. The deceased was lying on a bed when Dr. Baldeo Singh saw him at Dhundru. On 14th August Manzur Ahmad was brought back to Pilibhit in order to be attended to by Dr. Baldeo Singh. He came again to the house of Alauddin, his mother's brother. Dr. Baldeo Singh assisted by another doctor (Dr. Chatterji) operated upon him on 15th August. No less than two pounds of very evil smelling pus was taken from the abscess. The deceased was very weak and Dr. Baldeo Singh continued to treat him for some days. The wound was dressed daily, and the operation seems to have been fairly successful. Dr. Baldeo Singh ceased to treat the deceased after some days; first, because Manzur Ahmad would not take the medicines he directed and, secondly, because the doctor became seriously unwell himself. Dr. Baldeo Singh was also a witness for Rahim Bibi.

Another witness for Rahim Bibi was Dr. Chatterji, whom we have mentioned above as assisting Dr. Baldeo Singh. When he gave his evidence he was Civil

Surgeon at Pilibhit. He continued in attendance upon the deceased after Dr. Baldeo Singh had ceased to attend him. He says that after the operation Manzur Ahmad never gained sufficient strength to move about. On 2nd September he died. Dr. Chatterji says that he and Dr. Baldeo Singh, before they operated upon him, found that he was suffering from consumption, that his heart was weak, and they accordingly performed the operation without chloroform. He says that when he first saw Manzur Ahmad, the apex of his lung was affected. Before he died about one-sixth of both lungs was affected. The consumption had extended to his throat and the deceased was suffering from tubercular laryngitis, his voice had become hoarse and he eventually died from asphyxia, being unable to breathe in consequence of the laryngitis. During all this time, and when the deceased died, he was staying in the house of Alauddin. In the same house also lived Wisaluddin, a nephew of Rahim Bibi, that is to say, the son of her deceased brother. Wisaluddin and his brothers are the persons in whose favour Rahim Bibi has since parted with the greater part of her property and they were not heirs of Manzur Ahmad.

As already stated, while the deceased was staying in this house, he had sent to Dhundru to have the four thousand sovereigns dug up from the house of Jilani Bibi in order that they might be reburied in the house of his mother Rahim Bibi. Directions were also given to bring the Rs. 8,500 to Khub Chand, banker. The latter money duly reached Khub Chand, but the sovereigns, after being dug up, were stolen (half were afterwards recovered). This happened about 20th August or a little later. On 29th August the deceased executed a deed of transfer in favour of his mother Rahim Bibi in the following form :

"I, while in a sound state of body and mind, have absolutely sold of my own free will the entire 20 biswas zamindari property in Mauza Bithaura Kalan, Pargana and District Pilibhit, and the entire 20 biswa zamindari property in Mauza Amkhera, including the hamlets called Zahurganj, Manzurgunj, Samaria, and Makruli, Pargana Richa, Tahsil Baberi, District Bareilly, and with all the appurtenances and interests appertaining thereto, without the exception of any right or share, to my mother Mt. Rahim Bibi, wife of Sheikh Zahur Ahmad, Sheikh, resident of Mauza Dhundru, Pargana Jahanabad, District Pilibhit, for two lakhs of rupees, half of which is one lakh of rupees, and made over the

possession of both the properties sold to the vendee. Now neither I nor any of my representatives have any right in the abovementioned properties sold. Out of the entire sale consideration, I have received Rs. 10,000 in cash, and have left Rs. 1,90,000 with the vendee with my directions, in order that she may spend it with her own authority and at her own discretion for good purposes for the benefit of my soul in the next world. Hence I executed this document as a sale deed giving authority in respect of the sum held in deposit for charity, on a stamp paper of Rs. 2,000 under Art. 23 and on a stamp paper of Rs. 15 under Art. 7, Sch. 1, Act 2 of 1889, so that it may serve as evidence."

Registration was duly effected and the deed has the following endorsement:

"Let it be known that the executant is ill and he submitted a certificate of his illness given by the Assistant Civil Surgeon, Pilibhit, who is now Civil Surgeon in charge of Pilibhit with his application for issue of a commission which is in the office."

The certificate is as follows :

"I came to dress Sheikh Manzur Ahmad of Dhundru at the time when the deed was presented and execution admitted by him before the Sub-Registrar. I found his mental faculties unimpaired and he answered to every question referring to the deed quite correctly."

The deed was registered between five and six o'clock in the evening on 29th August 1912. This certificate was given by Dr. Chatterji at 5-30 in the evening. At 9-30 in the morning of the same day, Dr. Chatterji had given another certificate as follows:

"Certified that I examined Sheikh Manzur Ahmad, zamindar of Dhundru, this morning at the request of the Subdivisional Magistrate and found his mental faculties not affected yet, although his general condition is extremely weak."

It is pretty clear that the Sub-Registrar had some hesitation in registering the deed having regard to the condition of the deceased, and notwithstanding the explanation which Dr. Chatterji gave when giving his evidence, we think that his first certificate shows that the deceased's condition was very critical on the morning of 29th August. The certificate was given in English and Dr. Chatterji understands English. The words "found his mental faculties not affected yet" are significant. Immediately after the execution of the deed men were sent off post haste to make collections at the two villages and to apply for mutation of names. It was not the time of year at which collections are made and the collections which were in fact made were more or less of a formal character obviously the intention was to show that the deed had been acted upon and posses-

sion taken. Certainly those steps were taken with the least possible delay.

Rahim Bibi also examined Abdul Jabbar, a Hakim, who says that he had occasionally to see Manzur Ahmad one or two years before his death, and that he had been suffering from syphilis and gonorrhoea. The importance of the evidence of this witness is to show that the deceased had been suffering from consumption for a considerable period. The witness would not be in a position to speak of the deceased suffering from consumption from any scientific examination of the sputum. There was no blood in the sputum. Any suspicion he might have about consumption would be the consequence of his observation of the general state of health of the deceased and the fact that he suffered from fever. The fever from which Manzur Ahmad suffered might no doubt be attributed to consumption but it also might be attributed to the other diseases deceased suffered from and his weak state of health. Dr. Chatterji no doubt says that the progress of the consumption was slow, but we think that this statement is negated by the evidence of Dr. Banerji, which shows that even between 26th June 1912 and 7th August of the same year consumption was making rapid progress. We also think that the statement of Dr. Chatterji about the progress of the disease is negated by the facts that he himself has deposed to. At first the apex of the lungs was affected, that is about 15th August, and by the time he died one-sixth of both the lungs was affected. Moreover the disease had spread to his throat and tubercular laryngitis had set in. Signs are not wanting in the evidence or examination and cross-examination of Dr. Chatterji that he had become to some extent a partisan (see his attempt to wittle down the significance of his certificate in which he says that

"the mental faculties of the deceased had not yet been affected," although his general condition is extremely weak.")

The witness seems to have lent himself a little to an attempt which was being made to suggest that the illness of Mauzar was of long duration without any rapid increase. The doctrine of marazul-maut does not apply to cases of lingering and protracted illness.

The conclusion that we have come to is that the illness of Manzur Ahmad all

along rapidly progressed and increased between June and the 2nd of September when he died and that it cannot possibly be said that he suffered from a lingering disease. There is no very satisfactory evidence when consumption commenced but even if we assume that the seeds of the disease were present for some time the progress of the disease was rapid between June and 2nd September. We believe Dr. Chatterji when he says that when Manzur Ahmad left him on the 7th August the deceased was under the apprehension of death and if this view be correct nothing which subsequently happened was at all likely to lessen that apprehension. The sufferings of the deceased continued steadily to increase.

The evidence of Rahim Bibi herself shows that the deceased apprehended death and that she was frequently trying to console him and remove his apprehension. We think that the two certificates which Dr. Chatterji gave show that those about Manzur Ahmad believed that he was going to die and that this apprehension was shared by the Sub-Registrar. That those who were about him (near relations of Rahim Bibi) believed he was going to die is also shown by the very great haste there was in sending off men to make the collections at the two villages and filing an application for mutation of names on 30th August. What other people thought who were daily seeing the deceased is not without some bearing on what the deceased was likely to think himself. The learned Judge referring to the evidence of Abdul Aziz a witness for Fazl Ahmad says that the deceased told the witness that he was better and that as soon as he would recover he would show him the villages that required water. This is not quite what the witness said. Witness said that the deceased said "if he recovered." The learned Advocate for Rahim Bibi admitted that if there was a rapid increase in the disease about the time when the "gift" was made and if the deceased was under apprehension of the near approach of death the rule of *marazul maut* would apply even though the deceased had been suffering from consumption for more than a year before he made the gift. In our opinion the illness of the deceased was not a lingering disease and he was under the apprehension

of near approaching death and if the transfers of the money and of the land ought to be regarded as "gifts" to Rahim Bibi, they were void under the Mahomedan law as having been made when the donor was suffering from his death illness. The doctrine of *marazul maut* is founded on the Koran which ordains that the heirs must inherit. Even though our sympathies may be to some extent more with Rahim Bibi, the affectionate mother of the deceased we are bound to administer the law.

The next question we propose to deal with is what was the real nature of the transaction. If the transaction was a sale the doctrine of *marazul maut* does not apply. If the transaction was the creation of a *wakf* by the deceased the transaction would be good to the extent of one-third of the entire estate of the deceased. If it was a gift to Rahim Bibi one of the heirs it was altogether void. On the face of it the deed is a sale deed. But it is abundantly clear that Rahim Bibi had nothing like 2 lakhs of rupees wherewith to purchase the property. At the time the deed was registered the sum of Rs. 10,000 was produced before the Sub-Registrar, but we are absolutely convinced that this Rs. 10,000 did not belong to the Must. It was brought from the house of Khub Chand banker and was beyond all question money which had belonged to the deceased at least up to the time that the money had been changed from the account of the deceased to the account of Rahim Bibi in the books of the firm of Khub Chand and this change took place while the deceased was lying ill in the house of Alauddin. It is said that the deceased owed money to his mother and that the sale was made in consideration of the discharge of this debt. In the first place we must point out that the sale does not purport to be in consideration of the discharge of a debt. It is made in consideration of 2 lakhs of rupees' Rs. 1,90,000 being left with the vendee. In the next place Rahim Bibi tried to make out that the debt due to her by her son represented a fortune which she had received many years before (at the time of her marriage) of Rs. 40,000. She says that her husband kept this Rs. 40,000, that after his death it was handed over to her eldest son to be invested, and upon his death in the year

1906 it was handed over to Manzur Ahmad and that Manzur Ahmad owed her the original amount of her fortune together with a large sum accumulated during the lives of her husband and two sons. The learned Judge in the Court below is careful to say when he finds certain matters in favour of Rahim Bibi, that he must not be at all taken as endorsing this story of hers. We altogether disbelieve the story. There is no evidence worthy of name to support the allegation that Rahim Bibi ever had a gift of Rs. 40,000 which had been kept intact for her by the male members of the family. It is true that Rahim Bibi also states that she had some zamindari property and that the deceased used to collect the profits, handing over to her from time to time small sums which she required retaining the balance for her. We find that in the year 1892 after the death of Zahur Ahmad the husband of Rahim Bibi, an award was made under which she got a village called Purenia which brought in profits of about Rs. 1,000 per annum. In the year 1896 she got Rs. 2,000 a year in lieu of the village Purenia and in the year 1906 on the death of her eldest son she got property which brought her in about Rs. 4,500. (This was not in addition it must be remembered, to what she had previously). We find that the Musammat had an establishment of her own. She has been four times to Mecca. She had a number of relatives of her own to whom she would probably make gifts from time to time. She would also perhaps make some charitable gifts. Bearing in mind that the Musammat was the widow of a rich man and the mother of rich sons we think that her means were no more than sufficient for her own support and maintenance and that certainly there was no room for large accumulations. The probabilities are that one year with another she got from her son at least the amount of the profits of her property, probably a good deal more.

There are no accounts to show that her son had any moneys of hers in his hands. The only important evidence to support the allegation that the deceased owed his mother money is a deposition which Manzur Ahmad made on 25th August 1912, that is to say, at or about the very time when he was transferring a large amount of property to his mother. In this deposition Manzur Ahmad says that

whilst he was lying ill in the house of Alauddin, he had sent one Amir Khan (his mother's karinda) to take possession of the four thousand sovereigns on her behalf and that he had also told Amir Khan to get the Rs. 8,500 to deposit in the Kothi of Khub Chand to credit of his mother. In the deposition he says: "I said to Amir Khan that I owed money to my mother." It is contended that this admission by Manzur Ahmad of his indebtedness to his mother is very strong evidence that he owed her money. The deposition came to be made under the following circumstances. After the sovereigns were unearthed, they were made away with by the servants who were sent to get them. The Rs. 8,500 were duly deposited with Khub Chand but the sovereigns were stolen. For some time the loss of the sovereigns was kept from Manzur Ahmad, because it was thought that the news would have a very serious effect upon him in his delicate state of health. In the end however when the criminal law was set in motion against those alleged to be responsible for the theft, it was decided to get a deposition from Manzur Ahmad. The weight to be attached to the statement by Manzur Ahmad that he owed his mother money is greatly lessened by the fact that he had a motive for making the statement even if it was untrue. Moreover the statement was made at the very time he was handing over to his mother a large portion of his estate and when he knew (as we believe) that he was about to die. Manzur Ahmad did not even say he owed his mother money. He says that he told Amir Khan that he owed the money.

As to the question of wakf, the deed does not say that the villages were to be held as wakf property. If the deceased wanted to dedicate the villages, there is no reason why he should not have expressly dedicated them as he did the property in 1906 on the occasion of his previous illness. If he did not think he was going to die, he might have named himself as mutwalli as he did in 1909 or he might have named his mother mutwalli. The deed only says that Rupees 1,90,000 of the price (which was not and could not be paid) was to be applied for charitable purposes at the discretion of his mother. Looking at the evidence of Alauddin, of Rahim Bibi herself, the condition of the donor and the surrounding

circumstances, we have come to the conclusion that the handing over of the sovereigns and the transfer of the Rupees 8,500, Rs. 16,876 and of the two villages were in truth simply gifts made by the deceased to his mother and the provision in the deed that Rs. 1,90,000 should be applied in charity at the discretion of Rahim Bibi was a somewhat ingenious device to give the transaction the appearance of a sale so as to evade the Mahomedan law, which forbids a Mussalman in his death illness to make a gift to one heir at the expense of the others. It will be seen from the evidence of Alaud-din and Rahim Bibi that they did not think that a wakf was being made of Rs. 1,90,000, said to be left with Rahim Bibi.

We may mention here that neither side relied on the evidence of witnesses other than those we have mentioned. On both sides there was, as the learned Judge says, a considerable amount of hard swearing. Fazal Ahmad not only alleged but stated in his evidence that the deceased did not even know the contents of the deed; while we think that the deceased was in a very weak condition when he executed the deed, we agree with the Court below that he understood what he was doing. This is borne out by the fact that on 25th August he was able to make a deposition about the loss of the sovereigns. If Fazl Ahmad had confined himself to exaggerating the condition of the deceased, it might be said that one side was as bad as the other. But a litigant must be held responsible for the witnesses he produces to support his case and Fazl Ahmad produced a doctor who stated that he had examined the deceased shortly before his death. This witness was named Warris, who states that he is the most senior practitioner in Lucknow. He states that he saw the deceased at Pilibhit after the operation for the abscess in the intestines. He went to visit him early in the morning without informing Dr. Baldeo Singh or Dr. Chatterji. He removed the bandage, probed the wound, came to the conclusion that the case was quite hopeless and decided to have nothing more to do with the patient. He left Pilibhit without seeing either of the doctors. He gives a most extraordinary account of his journey from Bareilly to Pilibhit and from Pilibhit back to Bareil-

ly by road. The learned Judge was of opinion that this witness had never visited the deceased at all, and we fear there are grave reasons for thinking that the learned Judge was right. It is almost unbelievable that a doctor who had taken his degree at Edinburgh University, would have visited the deceased without informing the doctors, who had just operated upon him. It was even more extraordinary that he should have interfered with the wound. His account of his journey by road in the height of the rains looks rather like as if he was afraid to say he came by train, because it should have been proved that he did not. The learned Judge comments upon the evidence given by another witness produced by Fazl Ahmad:

"Maulvi Bashiruddin, vakil, is guilty either of perjury or its abetment or of gross misconduct as a legal practitioner. No one would believe him that with the knowledge of forgery and incapacity in the executant he acted as a vakil for Rahim Bibi and supported her title on the invalid forged deed. He is condemned on his own admission. I need not waste time in commenting on his evidence beyond saying that he fully deserves prosecution. His story is that he was brought to Pilibhit to fair out the sale-deed, but he refused to take part in the forgery after looking at Manzur Ahmad who was senseless."

Maulvi Bashiruddin undoubtedly gave the evidence to which the learned Subordinate Judge refers. He had undoubtedly previously acted for Rahim Bibi and we find (see p. 70 of the respondent's book in First Appeal No. 21 of 1916) that he actually sent to Rahim Bibi a paper containing on one side a number of questions which he as her vakil intended to ask her on examination and re-examination. On the other side he dictated the answers which she was to give to the questions which he intended to ask. We need only refer to two of these questions. One was

"what was the condition of Manzur Ahmad's senses at the time?—Answer: They were very good.—Question: Up to what time did Manzur Ahmad remain in his proper senses?—Answer: He was in his senses till he breathed his last."

It thus appears that the witness was prepared to come into Court and swear that the deceased was so bad that he refused to have anything to do with the deed, and with this knowledge he told Rahim Bibi to answer his questions exactly to the contrary. We have come to the conclusion that this appeal must be allowed. But to mark our strong disapproval of some of the evidence ad-

duced on behalf of Fazl Ahmad we disallow all costs of witnesses in the Court below. The order of the Court is that the appeal is allowed, the decree of the Court below set aside and the claim of Rahim Bibi dismissed with costs in both Courts, save as mentioned above. Costs in this Court will include fees on the higher scale. We direct the receiver to prepare and bring in as soon as reasonably possible a final account with a view to his being discharged.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 155**

PIGGOTT, J.

Mannua and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 263 of 1919, Decided on 23rd June 1919, from an order of Joint Magistrate, Cawnpore, D/- 1st March 1919.

(a) U. P. Municipalities Act (1916), Ss. 298 (g), 318 and 321—License properly applied for—Board cannot refuse license arbitrarily.

A Municipal Board would not be justified in refusing to grant a license properly applied for, under the bye-laws relating to dangerous and offensive trades, not on any grounds of public safety, health or public convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person. [P 157 O 1]

(b) U. P. Municipalities Act (1916), S. 298 (g), 318 and 321—Jurisdiction of civil Courts is limited by Ss. 318 and 321—Person aggrieved by bye law made under S. 298 (g)—Only remedy is appeal to high authority mentioned in S. 318—Suit however lies for injunction to compel Board to grant plaintiff license for carrying on particular trade provided he satisfies all necessary conditions.

Under the U. P. Municipalities Act of 1916 the jurisdiction of the civil Courts is limited by the provisions of Ss. 318 and 321 of the Act. Under these sections the only remedy of a person who considers himself aggrieved by a bye-law made under S. 298 (g) of the Act is by way of appeal to the higher authority referred to in S. 318 of the Act, but it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade upon a particular spot, provided always that the plaintiff was prepared to take out the license subject to all the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health, safety or convenience. [P 157 C 2]

*G. W. Dillon and Kailash Nath Katju—*for Applicants.

*Asst. Govt Advocate—*for the Crown.

Judgment.—The applicants in this case are Mt. Batasu, also called Mt. Diptian and her son Mannua, Ganga Putras by caste, residents of Cawnpur. They were prosecuted under the provisions of the United Provinces Municipal Act for keeping a certain plot of ground as a place for the storing of wood, without having obtained a license for so doing from the Municipal Board. Now it is not denied that the Municipal Board of Cawnpur has made bye-laws under S. 298 of the aforesaid Act, which bye-laws contain amongst other prohibitions a prohibition against any land within Municipal limits being used for the storage of wood, except under a license granted by the Board and subject to the provisions of such license. The record before me shows that Mannua on behalf of himself and his mother admitted that they held no license for storing wood at the spot in question. He even admitted that they had not, up to the date on which he made his statement in Court, presented to the Municipal Board any formal application for a license. He said he had asked an Inspector in the service of the Municipal Board verbally for a license and had been told by the Inspector that he could not get one. At his trial he presented a petition to the Joint Magistrate before whom he was being tried, addressing the said Magistrate in his capacity of a member of the Municipal Board of Cawnpur, asking that he might be granted a license. On this state of facts, and apart from all other considerations, it is sufficiently obvious that Mt. Batasu and Mannua have committed at least a technical breach of a bye-law lawfully made by the Municipal Board of Cawnpur and are liable to punishment. This however, does not quite conclude the matter.

The sentence imposed by the trying Magistrate has been a fine of Rs. 50 on each of the two accused persons. This is practically the maximum penalty prescribed by the Municipal bye-law for a first conviction in respect of an offence of this sort, the fine imposed being nonetheless the maximum fine of Rs. 100 because it has been apportioned in equal shares between the two keepers of the timber-yard. Now it has been represented to me on behalf of Mt. Batasu and Mannua that the sentence imposed is in any case excessive and that in view of the case as a whole, the Joint Magistrate should even

if he felt himself compelled to convict of a technical offence, have marked his sense of the equities of the case by imposing a merely nominal penalty. Now that the case has come before me in revision, I consider it incumbent on me to look into the matter from this point of view. The dispute between the applicants and the Municipal Board of Cawnpur goes back to the year 1914. It appears that in that year the Municipal Board came to the conclusion that the land on which the applicants were then and are now keeping a timber yard was Nazul land which could only be occupied on a lease or license granted by the Municipal Board. They took proceedings against these applicants for keeping a timber yard on Nazul land without the permission of the Board. The applicants replied that the land in question was not Nazul land, and that in any case it had been in the exclusive occupation for the purpose of a timber yard of the applicants and their predecessors-in-title for a period of more than fifty years. As a matter of fact the dispute in that case does not seem to have been directed specially to the question of any stock of timber on the land in question, but rather to the question of a hut alleged to exist upon the said site. The Court trying the case came to the conclusion that the Municipal Board was not entitled to maintain such a prosecution without first instituting a suit in the civil Court and obtaining an adjudication on the question of disputed title to the land itself. Towards the end of the year 1918 the question of the use of the land in suit by these applicants seems to have come up once more before the Municipal Board, and a resolution was passed the terms of which have been laid before me. The Board resolved that the lease of Nazul land granted to Mt. Batasu and Mannua should be cancelled and that no license should be given them for storing wood on the land in question. The present prosecution has followed naturally on the passing of this resolution. The applicants contend that the Municipal Board is not within its legal rights in refusing to grant them a license. Their case is that the bye-law under which they have been prosecuted forms part of a series of bye-laws dealing with dangerous and offensive trades, the object of which is the safety of the public and the prevention of nuisances.

It is contended on their behalf that

these bye-laws must be interpreted as a whole, and that, being so interpreted, they warrant the conclusion that the Municipal Board is under an obligation to grant a license under the said bye-laws upon any properly framed application, provided only they are satisfied that the trade in question can be carried on in the land for which license is sought without danger or injury to the public and that the person applying for a license is prepared to abide by all the prescribed conditions. I am asked to hold that if the present case be judged by these tests, the decision ought to be in favour of the applicants that the Municipal Board had no right to pass a resolution refusing to give them a license and that it is within the power of this Court to set aside a conviction, if it is satisfied that there has been a misuse of the powers conferred upon the Municipal Board by the Act which regulates and defines its powers. In this connexion I have been referred to the case of *Emperor v. Balkishan* (1) in which a learned Judge of this Court, in dealing with a conviction under the former Municipalities Act, 1900, went into the question of the reasonableness of a particular bye-law and set aside the conviction upon a finding that the bye-law in question was not reasonable and that its passing amounted to an abuse of power on the part of the Municipal Board. This decision cannot govern the case now before me in its entirety.

The bye-law which the applicants have contravened is in itself a very reasonable and proper one, and the applicants were technically in the wrong when they came before the Joint Magistrate's Court, because they had made no formal application to the Municipal Board for the grant of a license. I am still of opinion that, in spite of the Board's resolution of 20th November 1918, it is incumbent upon these applicants, unless they elect to submit to the orders of the Board and to remove their stock of wood from the site in question, to present through the proper channel a formal application for a license to the Municipal Board. Whatever resolution may have been passed by the said Board at a previous meeting upon an ex parte statement of the facts, it does not follow that a license would necessarily be refused after the applicants had laid their case fully before the

(1) [1902] 24 All. 439.

Board. I am bound to observe however that the position of the Board in this matter is a peculiar one. They are claiming the site itself as against Mt. Batau and Mannua. On the materials at present available to me I do not profess to understand the reference in the Board's resolution of 20th November 1918, to the cancellation of a lease said to be held by Mannua and his mother for the use of this land. For ought I know the Municipal Board may have been in possession of indisputable evidence that these applicants hold the land in suit as their lessees. In any case the papers before me show that the land in suit is claimed as nazul land on behalf of the Municipal Board and that this claim is being resisted by Mt. Batau and Mannua.

The question is whether the Municipal Board is acting within its lawful rights in using its power of withholding a license so as to put pressure upon these applicants and compel them to vacate the disputed site, without the question of title being brought for determination before a competent Court. On the facts now before me I hesitate about pronouncing a final opinion on this point. The Municipal Board may have adequate reasons for taking up the position that they would only be stultifying themselves, and making an admission which would be used against them in any subsequent civil litigation, if they were to grant these persons a license for storing wood on this particular site. I will not go further than to say that in my opinion the question would be one for careful consideration by the Municipal Board in the event of the matter coming before them upon a regular and formal application for a license made by Mt. Batau or Mannua or both. I so far agree with the main argument which has been pressed upon me in support of this application that I think it is correct to say that the bye-laws on the subject of dangerous and offensive trades must be considered as a whole, and that a Municipal Board will be straining its authority if it refuses a license, properly applied for under any of these bye-laws, not on any grounds of public safety, health or convenience, but merely in order to secure an advantage to itself in a dispute about a question of title with another person. The jurisdiction of this Court to inter-

fere on the criminal side has been sufficiently illustrated by the ruling which I have already referred to. It is beyond question also that, under the former Municipal Act, a suit would be maintainable for an injunction restraining a Municipal Board from interfering with the plaintiff's lawful exercise of his right to carry on a certain trade or employment upon a particular site, to the possession of which the said plaintiff had a clear title. Under the United Provinces Municipalities Act 2 of 1916 the jurisdiction of the civil Courts is limited by the provisions of Ss. 318 and 321 of the said Act.

I have no doubt that under these sections the only remedy of a person who considered himself aggrieved by a bye-law made under S. 298 of the Act, heading G (which is the heading dealing with offensive and dangerous trades), would be by way of appeal to the higher authority referred to in S. 318. But it is by no means equally clear that a suit would not lie for an injunction to compel a Municipal Board to grant the plaintiff a license for carrying on a particular trade upon a particular spot, provided always that the plaintiff was prepared to take out the license subject to all the conditions prescribed by the bye-laws and could satisfy the Court that the Municipal Board had refused him the license for reasons wholly unconnected with the public health, safety or convenience. I do not think I can profitably say anything further about this case as it stands. I reduce the sentence imposed upon Mt. Batau and Mannua to one of a fine of Rs. 10 against the two of them or Rs. 5 each. The balance of the fine, if paid, will be refunded to the applicants. I leave it to the parties concerned to reconsider their position in the light of such remarks as I have thought it expedient to make. If the matter should unhappily come before this Court again, the point for consideration will undoubtedly be, which of the two parties has honestly and in good faith endeavoured to put itself in the right. I must not be understood for a moment to have laid down that these applicants are entitled to persist in their present attitude of contumacious resistance to the Municipal bye-laws. They are bound either to submit to those bye-laws or to take proper steps to bring the matter in dispute

between themselves and the Municipal Board to the adjudication of a competent authority; and the first step which they must take, I have no doubt, is the presentation, through the proper channel, of a regular and formal application for a license for the storage of wood in the site in question.

v.B./R.K.

Sentence reduced.

A. I. R. 1919 Allahabad 158

RICHARDS, C. J.

Gur Din—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 148 of 1919, Decided on 15th March 1919, by Sess. Judge, Saharanpur, D/- 4th March 1919.

(a) **Cantonment Code (1912), Ss. 103-B, 103-A and 288—Proceedings under S. 103-B are illegal in absence of written notice.**

Proceedings under S. 103-B are illegal if the accused has not had written notice as required by that section. A Cantonment Magistrate gave verbal orders to a mali to lop off certain shrubs in the compound of a house close to a corner of a public road. The orders were not obeyed and the mali was charged and convicted under S. 288. No written notice was served upon the accused:

Held: that inasmuch as the land on which the shrubs stood did not belong to the Government, the proceedings were under S. 103-B, and before a conviction could be obtained, it was necessary that a written notice should have been given to the accused requiring him to lop off the shrubs.

[P 158 C 2]

(b) **Criminal Trial—Power of Court—Bond executed by accused for appearance—He must whether guilty or not, obey bond.**

A Magistrate is entitled to require a person charged with an offence to give a bond for his attendance, and the accused person, whether guilty or not, is bound to obey the terms of the bond and to appear to answer the charge.

[P 158 C 2, P 159 C 1]

Judgment.—This is a reference by the learned Sessions Judge of Dehra Dun recommending under S. 438, Criminal P.C. that the conviction and sentence passed against Gurdin should be set aside. It appears that some shrubs in the compound of a house formed an obstruction at a certain corner of a public road which was considered dangerous to motorists and others using that road. The Officer Commanding the Station wrote to the Cantonment Magistrate suggesting that steps should be taken to remove the obstruction. The learned Cantonment Magistrate gave a verbal order to a mali to lop the shrubs. The mali said that he would speak to the head Mali and the head mali was the accused Gurdin. It is proved that this verbal order was com-

municated to Gurdin who disobeyed or disregarded the order probably acting under instructions from the owner of the compound. Thereupon a charge was made against Gurdin under S. 288 of the Cantonment Code for not having complied with the order to lop the shrubs. Gurdin was convicted and fined Rs. 3. The learned Sessions Judge has pointed out that under the provisions of the Cantonment Code before anyone could be convicted, it was necessary that a written notice should have been given requiring the trees to be lopped. It is admitted that no such written notice was given. The Cantonment Magistrate has explained that the proceedings were under S. 103-A, and not under S. 103-B. He says there is nothing about a written notice in S. 103-A, but he admits that if S. 103-B applies, then a written notice was necessary and the conviction was bad. A reference to S. 103-A will show that this clause gives the Cantonment Magistrate authority to cause trees to be lopped or trimmed standing on land belonging to Government. It may possibly be that the cantonment authority might have themselves caused the trees to be lopped or trimmed provided the land on which they were standing was Government property. But Gurdin was being proceeded against because he had not complied with an alleged order. The proceedings against him were clearly purported to be under S. 103-B and not under S. 103-A.

There is another reference connected with this. It appears that Gurdin appeared to answer the charge to which I have just referred. The case was not taken up that day and Gurdin gave a bond that he would appear upon a future day to answer the charge. He did not appear on that day, although he did on a subsequent day when he explained that he had not attended because his master had told him not to. The learned Sessions Judge considers that inasmuch as the conviction was illegal and could not be sustained, that therefore all the rest of the proceedings were ultra vires. I do not think that this contention is good. A man may be charged with an offence, and he may be able to show that he is not guilty of the offence; but while the charge is pending the Magistrate is certainly entitled to require the accused to give a bond for his attendance and the

accused person, whether guilty or not, is bound to obey the terms of the bond and to appear to answer the charge. I set aside the conviction and sentence. The fine if paid will be refunded. The record may be returned.

V.B./R.K. Conviction set aside.

A. I. R. 1919 Allahabad 159

TUDBALL, J.

Mula—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 725 of 1918, Decided on 28th November 1918, from order of Dist. Magistrate, Saharanpur.

Penal Code (1860), Ss. 182 and 211—False information to police followed by complaint to Magistrate—Police officer is competent to prefer complaint under S. 182.

M gave information to a Police Officer that certain persons had stolen his property. Subsequently he made a complaint to a Magistrate to the same effect. The police in their investigation came to the conclusion that the information given by *M* was false. The Magistrate also called upon the police for a report. The police reported that the complaint was false. But as *M* asked for an opportunity to produce his witnesses, the Magistrate, after examining his witnesses, fixed a date and issued summons to the accused to appear. On the date fixed *M* and his witnesses did not appear. So the Magistrate discharged the accused. Upon this the Police Officer to whom the false information was given laid a complaint against *M* under S. 182:

Held: that the bare fact that *M* had subsequently made a complaint to a Magistrate and then dropped proceedings was no bar to the Police Officer, to whom the false information had been given, making a complaint of an offence under S. 182.

[P 159 C 2]

Nihal Chand—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The facts of this case are simple. *Mula*, on 1st August 1918, gave information to a Police Officer that certain persons had committed theft of his property. On 3rd August 1918 he made a complaint to a Magistrate to the same effect. The police in their inquiry came to the conclusion that the information *Mula* had given to them was false. The Magistrate before whom the complaint was made called upon the police for a report. The police reported that the complaint was false. *Mula* asked for an opportunity to produce his evidence. The Court allowed him to produce his witnesses without summoning the accused. After examining his witnesses the Magistrate fixed a date and issued summons to the accused to appear. On the date fixed *Mula* and his witnesses did not appear.

The Magistrate having no evidence against the accused discharged him. Thereupon the Police Officer to whom the false information was given laid a complaint and preferred a charge under S. 182 against *Mula*.

This was sent to a Magistrate of the Second Class to try. He came to the conclusion that from the facts above stated *Mula* was triable only for an offence under S. 211, I. P. C., and not under S. 182 and that he had no power to try such an offence. He returned the record, which went to the District Magistrate. The District Magistrate returned the record to him, pointing out that the offence of which a complaint was made was under S. 182 and that he was bound to try it. The present application is made in revision against this order. In my opinion the District Magistrate's order is correct. The bare fact that *Mula* subsequently made a complaint to a Magistrate and then dropped the proceedings is no bar to the Police Officer, to whom the false information was given, making a complaint of an offence under S. 182, I. P. C. It is urged that the first part of S. 211 covers the offence of which a complaint has been made. This may or may not be correct, but one thing is certain and that is that S. 182 does cover the case if the information given to the Police Officer was false. My attention has been called to the decision in *Hardwar Pal v. Emperor* (1). The opinion which I expressed in the course of that judgment is by no means in the applicant's favour. Attention is also called to the decision in *Brown, F. A. v. Ananda Lal Mullick* (2). Even the decision in that case does not help the applicant. At one place the Court remarked:

• "If Ananda Lal Mullick had based his charge on S. 182, I. P. C., which he might have done, the sanction of the Police Officer to whom the alleged false charge was made or the sanction of some public servant to whom he was subordinate would have been necessary."

In the present case there is no question of any sanction. It is the public officer concerned who has made the complaint. He, like any ordinary member of the public, is entitled to have his complaint heard. It is a complaint of an offence under S. 182 of the Code, to which S. 195, Cl. (a), Criminal P. C., applies.

(1) [1912] 34 All. 522=16 I. C. 510.

(2) [1916] 44 Cal. 650=36 I. C. 857.

Cl. (b) of that section has nothing to do with the present case. In my opinion there is no force in this application. It is therefore rejected. The proceedings will be continued.

V.B./R.K. *Application rejected.*

A. I. R. 1919 Allahabad 160 (1)

STUART, J.

Alua—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 158 of 1919, Decided on 26th April 1919, from order of Magistrate, Hamirpur, D/- 13.1.1919.

Arms Act (1878), Ss. 13, 14, 15, 16 and 19—Servant of person exempted, shooting game with master's gun with his permission, commits no offence.

The servant of a person exempted from the operations of the Arms Act commits no offence by carrying his master's gun and shooting game with it with his master's permission. [P 160 C 2]

Vishun Nath—for Petitioner.

R. Malcomson—for the Crown.

Judgment.—The District Magistrate of Hamirpur has convicted Malua under the provisions of S. 19, Arms Act and sentenced him to a fine of Rs. 20. The facts are as follows: Malua is a trolley man on the G. I. P. Railway and has for many years been employed in his spare time by officers on the line as a shikari. On 2nd January 1919 Malua was seen by a police constable carrying a double-barrelled gun. The police constable asked him what right he had to carry the gun. Malua explained that he had been sent by Mr. Barton, Resident Engineer of the Railway, with the gun and some cartridges to track and dispatch a sambhar which Mr. Barton had wounded the day before. He substantiated this story absolutely by producing a written authority from Mr. Barton directing him to carry the gun and dispatch the sambhar. This was all. For this Malua has been convicted by the District Magistrate and sentenced to a fine of Rs. 20. Had there been any case in law against Malua the prosecution would have been most ill-advised on these facts, and the sentence in no circumstances could be supported. At the most the offence would have been a technical offence not requiring a prosecution. The sentence should never have been more than nominal, had Malua's act constituted an offence. But under the law Malua has committed no offence whatever.

It was laid down in this Court in *Hurley, In re* (1) that the servant of a European exempted from the operations of the Arms Act commits no offence by carrying his master's gun and shooting game with that gun with his master's permission. Later it was held by a Bench of this Court in *Queen-Empress v. Ganga Din* (2) that in the case of persons exempted from the operations of Ss. 13 to 16 of the Act, such persons would be permitted to send their servants to shoot birds with their weapons. The exemption in the case of the gentleman whose servant was prosecuted in *Queen-Empress v. Ganga Din* (2) was under S. 2 of the Exemption Rules. The exemption in Mr. Barton's case is under S. 13, but the principle is exactly the same. So the conviction is bad in law. I therefore accept this application, set aside the conviction and direct that the fine, if paid, be refunded.

V.B./R.K. *Application accepted.*

(1) 1881] A. W. N. 7.

(2) [1889] 22 All. 118.

A. I. R. 1919 Allahabad 160 (2)

KNOX, J.

Maiku—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 772 of 1918, Decided on 27th February 1919, against order of Dist. Magistrate, Farrukhabad, D/- 14th September 1918.

Criminal P. C. (1898), Ss. 55 and 57—Person acquitted on charge of dacoity immediately re-arrested under S. 55—Procedure is illegal.

For a police officer or Magistrate to detain a person after orders have been passed for his immediate release is a most grave irregularity and might expose the Magistrate or police officer to serious results.

On the acquittal of a person on a charge of dacoity he was immediately re-arrested by the police under S. 55, and kept in custody for twelve days:

Held, that the procedure adopted by the police was altogether illegal and entirely without jurisdiction. [P 161 C 2]

Uma Shankar Bajpai—for Applicant.

R. Malcomson—for the Crown.

Judgment.—Maiku was on his trial before the Sessions Court of Farrukhabad on 24th July 1918. He was being tried for the offence of dacoity. He was acquitted and the order passed by the learned Sessions Judge ran as follows:

"I acquit Maiku of offences charged under S. 395, I. P. C., and direct that he be set at liberty."

Instead of being released from custody as this order directed, he was then and there re-arrested and as a matter of fact was not released from custody until 17th January 1919. As we shall presently see the order of re-arrest and subsequent proceedings were entirely illegal and some one is responsible for this very serious act of detaining a person in illegal custody. I examined Syed Ali Abid, Deputy Superintendent of Police, who was stationed at Fatehgarh in July 1918, and he says that the usual procedure in cases of this kind is that the accused, who are acquitted, in order to be released are sent back to jail, the bar fittings are removed and the accused are released. The authority under which the accused Maiku was re-arrested was an order issued by the Superintendent of Police as far back as 30th May 1917. It runs as follows: "In future arrest all men acquitted in dacoity cases by Sessions under S. 55." S. 55, Criminal P. C., says that any officer in charge of a police station may arrest or cause to be arrested any person who was by repute a habitual robber, house-breaker or thief, or a habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury. This order was an order issued without any authority and with a contempt for personal liberty of the subject which is somewhat startling. It has been condemned and the illegality of it pointed out by more than one ruling of this Court. A Full Bench ruling of this Court, see *Empress v. Madar* (1), characterises it as follows:

"It is intolerable that the police should pursue the investigation of crime, by defying all the provisions of the law for the protection of the liberty of the subject, under the colourable pretension that no actual arrest has been made, when, to all intents and purposes, a person has been in their custody."

And again the Full Bench pointed out that the procedure is illegal and is a gross and unwarrantable breach of the powers entrusted to police officers. But the police appear to have gone on further in deliberately breaking the law. When a person is arrested under S. 55, S. 57 requires that where the true name and residence of the persons re-arrested has been ascertained, he shall be released on

his executing a bond, with or without sureties, to appear before a Magistrate if so required. It is idle for the police to say that they did not know the true name and residence of Maiku; they should have taken him at once before a Magistrate within 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Some attempt was made before me to say that this was done, but the evidence of Ram Narain Agarwala, the Magistrate before whom Maiku was eventually taken, is to the effect that Maiku was not placed before him on 24th July 1918 but on 5th August 1918. His evidence was taken before the Deputy Commissioner of Sitapur. The very fact that Maiku was detained in this way for 12 days leads to the inference that the police had not at the time of arrest the evidence necessary, if indeed they had any evidence at all, whereby it could be shown that Maiku had the reputation of being an habitual offender. In this connexion there is a document on the record which is very suggestive. When he was produced in the police office just after his re-arrest, the report says this man has never been convicted before (*saza yafta sabig nahin hai*). I am surprised that the Magistrate viewed the detention of this man with such apparent indifference.

Here was a man for whose release orders had been issued and who is put up before this Magistrate after what one must term an illegal detention for 12 days. Instead of proceeding to look into the matter he puts it aside on the ground that the trial under S. 110 could not proceed as an application was pending before the District Magistrate. That application was an application by this wretched prisoner calling attention to the fact that orders for his immediate release were passed and still here he was detained in custody. It augurs ill for the personal liberties of an accused if a Magistrate whose duty it is to protect him shows such indifference to his being detained as though he were a criminal subject. It seems almost idle to call the attention of the Magistrate to this grave irregularity when this Court had on several previous occasions called attention to it without any effect. I can only again point out that for a police officer or a Magistrate to detain an accused person, when orders had been passed by the

(1) [1885] A. W. N. 59.

Sessions Judge for his immediate release, is a most grave irregularity and might expose a Magistrate and police officer to very serious results. The proceedings taken after the orders of the release of the accused are entirely without jurisdiction. I allow the application and set them aside. I again draw the attention of the District Magistrate of Farrukhabad to the direction that Maiku is to be released forthwith without any bond or recognizance or limitation of any kind until such can be taken under any warrant of law.

V.B./R.K.

*Application allowed.***A. I. R. 1919 Allahabad 162**

RAFIQUE AND LINDSAY, JJ.

Ali Muqtadi Khan—Appellant.

v.

Abdul Hamid Khan—Respondent.

First Appeal No 348 of 1916 Decided on 8th February 1919.

Mahomedan Law—Wakf—Construction of—Office of muttawali to descend from generation to generation.

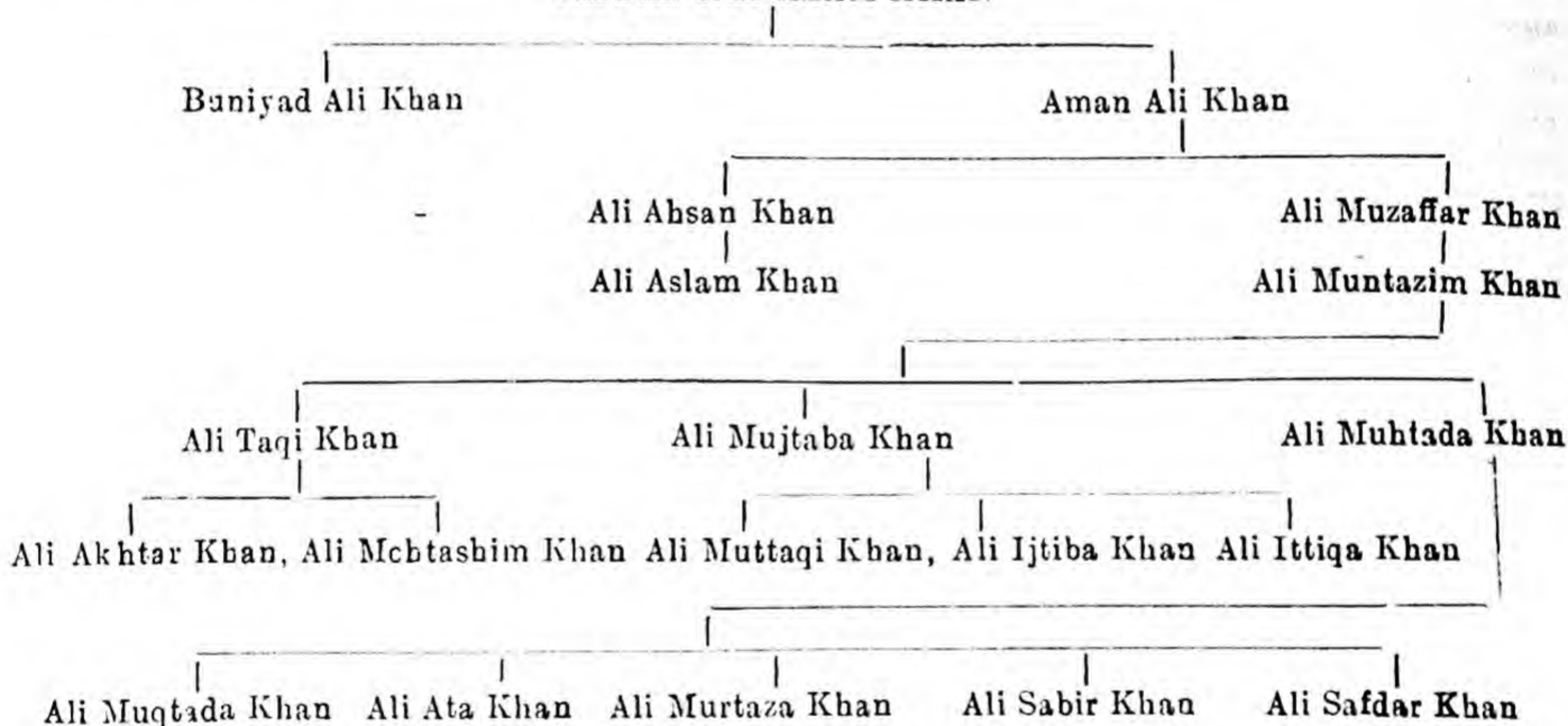
A Mahomedan created a wakf of certain property by registered deed, under which his two nephews A and M were appointed muttawalis of the wakf property after his death. The deed provided that the muttawaliship was to descend to the issues of the two nephews *naslan bad naslan wa batnan bad batnan daiman wa abdan ghair munqataan wa la muntaqilan ala sabil al istimrar wal istiqlal* :

Held : that under the terms of the deed the office of muttwali was to go generation after generation to the descendants of A and M in all the branches of their family, and that there was nothing in the deed by which any preference was to be given among such descendants, nor was any limit placed on the number of muttwalis from among them. [P 164 C 1]

*Haider—*for Appellants.*Girdhari Lal Agarwala—*for Respondents.

Judgment.—The following pedigree will explain the right under which the plaintiffs brought the suit out of which this appeal has arisen.

SAIYED ALI AZAM KHAN



The ancestor of the plaintiffs, Buniyad Ali Khan, was possessed of considerable property in respect of which he created a wakf on 23rd November 1845 by a registered deed, under which his two nephews Ali Ahsan Khan and Ali Muzaffar Khan were to be muttawalis of the wakf property after his death. He further provided that the muttawaliship was to descend to the issue of the two nephews :

"naslan bad naslan wa batnan bad batnan daiman wa abdan ghair munqataan wa la muntaqilan ala sabil al istimrar wal istiqlal,"

in other words, the descendants of the two nephews were to get the muttwali-ship generation after generation without any break and without any separation

for ever and for ever. Ali Muzaffar Khan seems to have survived his brother Ali Ahsan Khan and his nephew Ali Aslam Khan. Before his death Ali Muzaffar Khan executed a deed on 18th April 1875, by which he appointed his son Ali Muntazim Khan as muttwali of the wakf property. Ali Muntazim Khan succeeded to the office of muttawali. He in his turn on 14th July 1901 executed a deed of appointment in favour of his three sons, Ali Taqi Khan, Ali Muhtaba Khan and Ali Muhtada Khan, transferring the office of muttawali to them in his lifetime. The three sons of Ali Muntazim Khan executed a deed, which is described as an amanatnama, on 6th January 1903 by which they divided the waqf property

in equal shares among themselves, professedly with the object of the better management of the wakf property. On 23rd July 1904 Saiyid Ali Taki Khan executed a deed of mortgage in favour of two brothers, called Abdul Hamid and Abdul Majid, of property that formed no part of the wakf property. On the same date two other documents were executed, one by Saiyid Ali Taqi Khan and the other by the mortgagees. The said two documents were patta and kabuliyat respectively in respect of a portion of the wakf property which had come under the management of Ali Taqi Khan under the deed of 6th January 1903. The lease was for 14 years in favour of the mortgagees and the rent was to be appropriated by them towards the satisfaction of the mortgage debt. On 15th of November 1904 another mortgage was executed by Saiyid Ali Taqi Khan in favour of the same mortgagees in respect of some other portion of the property which also did not form part of the wakf property. On the same date a lease was granted by Ali Taqi Khan to the mortgagees of a portion of the wakf property the rent of which was to be applied towards the satisfaction of the mortgage debt. The mortgage was for Rs. 1,500. Some time in March 1909 Ali Taqi Khan executed a zarepeshgi lease in favour of one Mr. Nandrani in respect of a portion of the wakf property. On 16th February 1911 Ali Taqi Khan executed a deed by which he withdrew from muttwaliship in favour of his two sons Ali Akhtar Khan and Ali Muhtashim Khan. On 13th February 1911 Ali Mujtaba Khan executed a similar deed in favour of his three sons, Ali Muttaqi Khan, Ali Ijtiba Khan and Ali Ittiqa Khan.

Ali Muhtada Khan, the brother of Ali Taqi Khan and Ali Mujtaba Khan, had already died. He died in 1903. Soon after the execution of the deed of 16th February 1911, the sons of Ali Taqi Khan brought a suit to have the zarepeshgi lease in favour of Mt. Nandrani declared invalid, null and void. The case came up to this Court and was decided against them. It was held that they had no right to sue as their father could not in his lifetime transfer the muttwaliship to them. The judgment of this Court was delivered on 15th July 1915. On 23rd September 1915 Ali Taqi Khan and Ali Mujtaba Khan applied to the District

Judge of Moradabad under S. 73, Trusts Act, for permission to withdraw from the muttwaliship. The next day, that is on 24th September 1915, their sons filed an application to the District Judge praying to be appointed as muttwalis in place of their fathers. On 27th September 1915 the District Judge granted both the applications. On 30th September 1915 the sons of Ali Taqi Khan and Ali Mujtaba Khan as well as three sons of Ali Muhtada Khan brought the present suit asking for a declaration that the leases executed by Ali Taqi Khan in the year 1904 in respect of a portion of the wakf property were invalid and that possession should be given to them as muttwallis of the said property against Abdul Hamid and the legal representatives of Abdul Majid by the dispossession of the latter. It should be observed here that Abdul Majid had died prior to the institution of the suit. The plaintiffs impleaded as defendants in the case Abdul Hamid Khan and the legal representatives of Abdul Majid Khan as also Ali Taqi Khan, Ali Mujtaba Khan and the two remaining minor sons of Ali Muhtada Khan. The suit was contested by Abdul Hamid Khan and the legal representatives of Abdul Majid Khan. One of the pleas in defence was that the plaintiffs had no right to maintain the suit inasmuch as they were not the properly constituted muttwalis of the wakf property. The learned Subordinate Judge accepted the plea in defence and dismissed the suit. He held that under the judgment of this Court in the case of Nandrani, the transfer by Ali Taqi Khan and Ali Mujtaba Khan of the Muttwaliship in favour of their sons was invalid and did not give them a right to the office of muttwaliship. As to the three sons of Ali Muhtada Khan, namely, plaintiffs 1, 2 and 3, he held that under the amanatnama of 6th January 1903, they had no right to challenge the act of Ali Taqi Khan. The plaintiffs have come up in appeal to this Court and challenge the decree against them. Before proceeding to consider the appeal we must observe here that one of the legal representatives of Abdul Majid Khan, namely, Mt. Ruqaivya Bano, who was respondent 3 before us, died about three years ago. No steps were taken to bring her legal representatives on the record in time and the appeal as against her abates.

It is contended on behalf of the appellants that under the Mahomedan law, Ali Taqi Khan and Ali Muftaba Khan could transfer the office of muttwaliship to their sons. Moreover even if the transfers by Ali Taqi Khan and Ali Muftaba Khan are invalid the sons of Ali Muftada Khan are co-mutwallis with Ali Taqi Khan and Ali Muftaba Khan. The original deed of wakf shows clearly that the muttwaliship was to continue in all the branches of the family of the nephews of Buniyad Ali Khan. Our attention has been called to the original words, naslan bad naslan, etc., which have been quoted in the earlier part of the judgment. The three sons of Ali Muftada Khan, it is said, can, in any case, maintain the present suit if the plaintiffs 4 to 8 the sons of Ali Taqi Khan and Ali Muftaba Khan, have no such right. We have considered the language of the original deed of wakf and we think that the contention for the appellants is well founded. Under the terms of the deed the office of muttawali was to go generation after generation to the descendants of Ali Ahsan Khan and Ali Muzaffar Khan. No mention is made in the deed of wakf by which any preference is to be given among the descendants of the said two persons, nor is any limit placed on the number of mutawallis from among the descendants. It may be that the deeds of appointment by Ali Muzaffar Khan and Ali Muntazim Khan were not justified under the Mahomedan law, but the sons of both would have taken and did take the office of muttawaliship after their deaths. The succession was both in accordance with the terms of the original deed of wakf and the Mahomedan law.

The deeds of appointment of 1875 and 1901 do not in any way affect the status of the sons of Ali Muftada Khan. Ali Muftada Khan died in 1903 and under the terms of the deed of 1845 his sons succeeded to the office of muttwaliship and became co-muttawalis with Ali Taqi Khan and Ali Muftaba Khan. The opinion of the Court below that on the death of Ali Muftada Khan, his two brothers Ali Taqi Khan and Ali Muftaba Khan alone remained muttwalis is incorrect. There is no question of survivorship in the case either under the Mahomedan law or in the terms of the deed of 1845. The view that we take

of the case makes it unnecessary for us to decide whether plaintiffs 4 to 8 are entitled to maintain the suit. We think that plaintiffs 1 to 3, namely: Ali Muftadi Khan, Ali Ata Khan and Ali Murtaza Khan, have a right to maintain the present suit. The amanatnama of 6th January 1903 does not, in our opinion, take away that right from them. Whatever may have been the position of Ali Muftada Khan who was one of the executants of the document, his sons are in no way bound by it. We would also note here that the learned counsel for the appellants does not press his claim for mesne profits. We therefore allow the appeal, set aside the decree of the Court below and remand the case under O. 41, R. 23, for disposal on the merits. Costs here and hitherto will abide the result and costs in this Court will include fees on the higher scale.

Order.

By the Court.—It has been brought to our notice to-day that Mt. Ruqaiya Bano, respondent 3, is dead. According to the report of the serving officer of the Munsif's Court at Amroha which is dated 30th January 1917, she died more than 6 or 7 months prior to the making of the report. On 12th February the fact that she was dead was brought to the notice of the appellants and they asked for time to bring her legal representatives on the record. Accordingly one month was allowed to them. They got further extensions in the year 1917. No steps were however taken and her legal representatives have not yet been brought on the record. The appeal therefore as against Mt. Ruqaiya Bano abates and we note accordingly. This note will remain on the record.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 164

PIGGOTT, J.

Ram Lal and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 845 of 1918, Decided on 8th February 1919, from order of Sess. Judge, Jhansi.

(a) **Workman's Breach of Contract Act (1859), Ss. 1 and 2—Workman paying penalty in full for breach of contract can lawfully refuse to continue to work.**

A workman, who pays in full the penalty which his master or employer has agreed before hand to accept as compensation for any breach

of the contract of service on the part of the workman, has a lawful and reasonable excuse for refusing to continue to perform his work according to the terms of his contract. [P 166 C 2]

(b) **Workman's Breach of Contract Act (1859), Ss. 1 and 2—Stipulated penalty in event of breach between employer and workman capable of enforcement by civil suit—Penalty neither enforced nor payment of same tendered by workman—Employer is not precluded from availing himself of provisions of Act.**

An employer of labour is not precluded from availing himself of the provisions of the Workman's Breach of Contract Act merely because in the contract of service between himself and his workmen there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced nor payment of the same tendered on the part of the workmen. [P 167 C 1]

Kailas Nath Katju—for Applicants.

Sital Prasad Ghosh—for the Crown.

Judgment.—This is an application for revision of an order of the Sessions Judge of Jhansi, declining to interfere with an order by a First Class Magistrate of the same district passed under S. 2, Workman's Breach of Contract Act (13 of 1859). As the application raises one question of law on which it is supported by the authority of the Punjab Chief Court, I think it advisable to state the essential facts of the case and my reasons for rejecting the application. The applicants are eight workmen who entered into an agreement by which they incurred certain joint and several liabilities towards a contractor named Murli Dhar. The applicants were to furnish Murli Dhar with stone road metal at certain specified rates. They were to receive advances from the said contractor and they were to continue working for him, and for no one else, so long as any sum remained due to Murli Dhar in respect of the said advances. There was a special provision to the effect that the contract might at any moment be terminated on the workmen's repaying to Murli Dhar double the amount of the balance due in respect of advances received. In the month of November 1917 the workmen left Murli Dhar's service and entered that of certain rival contractors. At that moment a very considerable sum was due to Murli Dhar on account of the advances which he had made. The sum to his credit in the hands of the applicants is found to have exceeded at the moment when they left his service Rs. 1,100. Murli Dhar did not im-

mediately apply for the remedy which he now claims as open to him under Act 13 of 1859, nor did he immediately institute a civil suit for the relief which he might have claimed under the penalty clause, that is to say, to recover double the amount of the pending balance of the advances from the defaulting workmen. He entered into negotiations with the rival contractors into whose service the applicants had passed, and also with the applicants themselves.

It is proved that negotiations took place in the course of which Murli Dhar made what seems to me on the materials available a fair, and even generous, offer. He said that he would be satisfied with the repayment of the pending balance of Rs. 1,100 odd, without any penalty, provided that two recruits for military service were provided in his name. Presumably he desired to render a public service, and to obtain a due credit for having done so, as a condition precedent to his accepting the settlement of the dispute between himself and the defaulting workmen on terms apparently most favourable to the latter. In consequence of this offer made by Murli Dhar, which I presume was ostensibly accepted by the workmen and by the rival contractors. Murli Dhar was repaid a sum of about Rs. 1,050. The finding is that a cash balance of Rs. 69 on account of the advances made to the applicants remained due from them, and this finding I am bound to accept. It appears also that Murli Dhar's stipulation as to the furnishing of two recruits for the public service was never complied with. When matters had reached this stage, Murli Dhar finally demanded that the workmen should return to his service and work off the balance of Rs. 69 due from them according to the terms of the contract, that is, by the supply of road metal at certain rates. The latter refused to do this, and thereupon proceedings were taken resulting in the present application. An order has been passed by the Magistrate which complies in substance with the provisions of Ss. 2 and 3, Act 13 of 1859. I should perhaps note that, in the course of these proceedings the applicants admittedly tendered the balance of Rs. 69 due to Murli Dhar, but the latter insisted upon the option given him by S. 2 of the Act to claim, not an order for the repayment of the money advanced, but one for

the performance of the work according to the terms of the contract.

With reference to this point, one of the pleas taken before me is that the order for performance of that work should not have been passed in view of the tender made by the applicants of the balance due. It seems sufficient to say that, if the provisions of Act 13 of 1859 are applicable at all to the circumstances of the case, the complainant, that is to say, Murli Dhar, had an option to refuse to accept the mere repayment of the balance due as adequate compensation. Moreover, it can scarcely be contended that the mere repayment of this small balance of the advances could on the face of it be regarded as affording adequate compensation to Murli Dhar for the conduct of the workmen in abandoning his service. In the same connexion the point is taken that the contract of service was too vague and indefinite to be specifically enforced. I can only say that, after due consideration of the terms of the contract, I am not of this opinion. The order is that the applicants shall supply stone road metal at certain specified rates, until the value of the material supplied at the said rates comes to Rs. 69. This is a clear and easily enforceable order, and it is in accordance with the terms of the original contract between the parties.

There remain two points for consideration. It is said that, inasmuch as the original contract of service provided for a penalty in the event of breach of the same, there was no remedy left to the employer under the provisions of Act 13, of 1859, and that he must be regarded as having virtually bound himself by contract to be content with the enforcement of the aforesaid penalty, that is to say, with the recovery through the civil Courts of double the amount of the balance of the advances due from his workmen on the date on which they deserted his service. There is authority for this proposition in the case of *Emperor v. Muhammad Din* (1), which has been followed by the Punjab Chief Court in a later case reported as *Emperor v. Khuda Baksh* (2). The opinion expressed by the learned Judges of the Punjab Chief Court is not supported by any detailed argument, unless a reference to the pre-

amble of Act 13 of 1859 is to be implied in the remarks of Kensington, J., in the earlier of two cases. It was pointed out by a learned Judge of this Court in the case of *Queen-Empress v. Indarjit* (3) that it is the specific provisions of the Act which require to be interpreted and enforced and that these ought not to be read subject to the general language used in the preamble. I note more particularly that in the contract of service which was before the Court in that case there was a specific penalty provided, but it was not suggested that the presence of this stipulation took the contract out of the operation of Act 13 of 1859. My own opinion is that the presence of such stipulation in a contract of service may make it impossible for the employer to invoke the provisions of Act 13 of 1859, but that it will only do so in the event of the workmen or labourers who entered into the contract paying, or tendering in full, the penalty provided by the contract itself. I may illustrate my meaning by the facts of the reported case of *Queen-Empress v. Indarjit* (3).

It was there provided that, if Indarjit committed a breach of the contract of service which he had entered into with the Elgin Mills Co. at Cawnpore, he should pay a sum of Rs. 99, or in the alternative the company might proceed against him under the provisions of Act 13 of 1859. In my opinion, if it had been found that Indarjit had, prior to the institution of any proceedings under the said Act, and indeed prior to any breach on his part of the conditions of the contract of service, paid or tendered to the company the full stipulated penalty of Rs. 99, it would not have been reasonable or lawful to enforce against him the provisions of Act of 1859. Referring to the terms of the Act itself, I would say that a workman, who had paid up in full the penalty which his master or employer had agreed beforehand to accept as compensation for any breach of the contract of service on the part of the workmen, had thereby provided himself with a lawful and reasonable excuse for refusing to continue to perform his work according to the terms of his contract. In the present case it is not suggested that the applicants, before they left Murli Dhar's service, or indeed at any time

(1) [1913] 23 P. R. 1913 Cr.=22 I. C. 742.

(2) [1914] 38 P. R. 1914 Cr.=27 I. C. 901.

(3) [1889] 11 All. 262.

since then, offered to pay the full penalty stipulated under the terms of the contract, that is to say, to repay to Murli Dhar double the balance of Rs.1,100 odd which was due to him on the date on which the contract of service was wilfully broken. I think therefore and it seems to me that I am supported in this view by the case of *Queen-Empress v. Indarjit* (3), that an employer of labour is not precluded from availing himself of the provisions of Act 13 of 1859 merely because, in the contract of service between himself and his workmen, there is a stipulated penalty capable of enforcement by a civil suit, in the event of breach of the contract on the part of the workmen, which penalty has admittedly not been enforced, nor payment of the same tendered on the part of the workmen.

The other point taken before me is that the negotiations which took place between Murli Dhar and the defaulting workmen, and also with the rival contractors into whose service the latter had entered, amounted to a novation of the contract of service between Murli Dhar and the applicants, so as to render the latter incapable of enforcement either by way of application under Act 13 of 1859 or in any other manner, but I think the simplest answer to this contention is that, on the facts found, there was no complete novation of contract. Murli Dhar offered to be satisfied with a certain payment, for less than the penalty to which he was entitled under his contract, provided a certain condition which he chose to attach to his offer were fulfilled. That condition was never fulfilled, and Murli Dhar's offer consequently lapsed. For these reasons I think that the decision of the Courts below in this matter was correct and I dismiss this application.

v.B./R.K. *Application dismissed.*

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WALSH, J.

Alay Ahmad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 63 of 1919, Decided on 8th March 1919.

(a) Penal Code (1860), S. 193—Perjury—Administration of oath should be proved.

In cases of perjury it is desirable that the due administration of the oath to the accused person

on the occasion in question should be proved like any other fact. [P 169 C 1]

(b) Criminal Trial — Procedure — Result cannot be allowed to depend on speculation.

The guilt or innocence of an accused person cannot be allowed to depend upon speculation, nor upon vacillating and contradictory statements of witnesses. [P 167 C 2]

(c) Criminal P. C. (1898), S. 439—Appellate Court not going thoroughly into questions dealt with at trial—High Court will investigate original trial to see that accused had fair trial.

Where it appears that an appellate Court has not gone thoroughly into the questions dealt with at the trial by the first Court, the High Court will in revision investigate the original trial to see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial, and that the decision was given according to law.

[P 168 C 1]

G. W. Dillon, Kerr and Raza Ali—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is a remarkable case and whether I am right or wrong in the view which I take on the merits, nobody can doubt that the result of the original trial was in the highest degree unsatisfactory. The charge against the accused is that he, as pleader, having had certain drafts contained in an envelope entrusted to him, either for safe custody, or to have fair copies of them prepared on some subsequent date, which drafts represented a compromise which had been arrived at in an unfortunate and protracted dispute between a brother and his sister, in a subsequent civil suit which the brother brought against his sister upon an allegation which the Subordinate Judge, who tried it, found to be wholly false, being called as a witness, swore that the document shown to him and known as Ex. 4 in that civil suit was one of the documents which had been entrusted to him. It was not; that fact, I think, is one of the few facts, which has been clearly established in the criminal inquiry. The question to be decided in this criminal inquiry is whether he knew that it was not, and falsely and wilfully swore that it was when he knew that it was not. The answer to that question depends upon whether it is proved that he knew the contents of the documents handed over to him. The contents and appearances of the false and true documents were very similar. Of course, he might have known; that goes without saying. His guilt or innocence however cannot depend upon speculation

Further, if portions of the prosecution evidence are believed and portions are disbelieved, he did know. But the guilt of accused persons cannot depend on vacillating and contradictory statements of witnesses, who either contradict themselves or are contradicted by persons called to support them.

It seems to me therefore that although this is not an appeal, I am bound to look carefully into the evidence to see whether the evidence as a whole was such that any Court would be justified in acting upon it in such a serious matter. The application before me is a revision application from an appeal to the Sessions Judge from the original trial of this matter, which was before a Magistrate. The judgment of the Sessions Judge dealt mainly with one or two technical points, one of which I shall have to refer to in a moment; so far as the merits are concerned, it is a general acceptance of the judgment of the Magistrate as being satisfactory without, as I think, analysing very carefully the strange features of the evidence and without really seeing whether the Magistrate had, in fact, satisfactorily dealt with all the difficulties in it. Therefore I have followed my usual practice, namely that when a revision is brought from the decision of an appellate Court and the appellate Court has not gone into the questions dealt with at the trial by the first Court with any great thoroughness, I make a point of investigating the original trial and seeing whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law.

The result of the investigation of the trial of the first Court in this case discloses several most unsatisfactory features. In the first place, the difficulties of the case were such that it was not really a case which could be handled satisfactorily by a Magistrate of the first class. Inasmuch as the charge was confined to perjury and the case was within his jurisdiction, he had no option, but the fact that he had to try the case was due to the unfortunate course, which this case has taken. If the Pleader was guilty of a false statement with reference to these documents in the civil suit in which he gave evidence on behalf of Fyaz Husain, those documents must have been

false to the knowledge of Fyaz Husain and somebody must have forged his sister's thumb-impressions upon them and the pleader, at any rate, must have been a party to uttering them in the trial of the suit. This would make Fyaz Husain a principal not only in the perjury complained of, but also in the forging of the documents and the uttering of them in the suit. The same learned Judge, who directed proceedings against the pleader, refused to direct them against the principal. It should be noted here that Fyaz Husain admittedly had in his possession blank pieces of paper bearing his sister's thumb-impression, and that his son was a clerk in the accused's employment and presumably had access to these drafts.

Secondly, the charge found by the decision of the Magistrate against this pleader is one of the most discreditable and serious of which a legal practitioner can be found guilty. It renders him unfit for his profession; it is of the worst public example and deserves, in his case, punishment of a very severe character. The Magistrate dealt with this pleader, so convicted, by giving him the nominal punishment of one day's imprisonment and a fine of Rs. 51 because, he said, he was an old pleader, which, if it is true, aggravates the offence, and also because he thought he might have acted out of sympathy for his client, which is, if true, a further aggravation of the offence. If that is the class of punishment and the character of matters which are supposed to mitigate misconduct of professional gentlemen, it is not to be wondered at, if perjury becomes rampant in Courts which so deal with it. I cannot believe that the Magistrate really regarded it as a fitting mode of dealing with the case. I have an uncomfortable feeling in my mind that having been directed by the Subordinate Judge to try the pleader for perjury, the Magistrate arrived at a compromise while entertaining doubt on the evidence as to the guilt of the accused. The procedure at the trial was unsatisfactory in the highest degree. The number of witnesses was few and the difficulties of the case rendered a continuous application to the facts and a careful determined effort to clear up all unexplained statements essential.

In fact, the hearing was spread over several weeks. The most important wit-

ness of all was heard on no less than five occasions during a whole month and other witnesses were sandwiched in between portions of his evidence; although the sequence of events was essential to a clear understanding of the evidence, no attempt was made to deal with it; hardly any dates are given and inconsistent and unintelligible statements follow each other in a kind of ramble which is by no means easy to follow. If there was any truth in the allegation against this pleader, he ought to have been committed to the Sessions and tried by a Court competent to try such a case for conspiring with his client to put forward false and forged documents.

Finally (although Mr. Dillon quite rightly drew my attention to the point, he asked me, at the same time, not to decide the case upon this point) there is grave doubt as to whether in any event, the conviction could stand, having regard to the fact that the prosecution failed to prove that the statements were made by the pleader on oath. It is not pretended that any proof of that essential fact on which the guilt of the accused depends was expressly given, the learned Sessions Judge has dealt with the matter by a kind of inference or implied proof based upon a section of the Evidence Act. I do not think it necessary to decide whether this view is right or wrong, but I do not hesitate to express my opinion that in every case it is desirable, as Mr. Dillon and Mr. Malcomson stated to be the usual practice of the Criminal Courts that in cases of perjury the due administration of the oath to the accused person on the occasion in question should be proved like any other fact.

Having examined the recorded evidence of the four witnesses upon whom the prosecution relied to establish the allegation against the accused (the fifth and sixth were purely formal), I come unhesitatingly to the conclusion that if I were sitting as the sole Judge of fact, I should have refused to convict anybody on such unsatisfactory evidence; and further if I were sitting as a mere Judge with a jury to decide the facts, I should have directed them that they ought not to convict on such evidence. That being the state of my mind, after a careful consideration of the evidence, I come unhesitatingly to the conclusion that the conviction should be set aside. It is only

right both in the interests of the pleader concerned as well as the trial Court that I should give my reasons.

The Magistrate in his judgment referred to discrepancies. They are a good deal more than discrepancies. If the documents were handed to the accused person to obtain fair copies so that the said fair copies might be compared with the drafts, and he did, as Mujtaba swore at a subsequent date, compare them with the drafts, then he must be taken to have known their contents. To that extent I accept Mr. Malcomson's argument. But the evidence on that point depends entirely upon the credibility of Mujtaba. He contradicts himself on that very point, stating in one portion of his evidence that they were given to him to take care of. He admits that he entertains ill-feeling towards the accused and is contradicted on the question as to whether the documents were taken out of an envelope at the particular moment when they were handed over to the accused. I regard the evidence of Abrar Husain and Ejaz Husain as in the main correct. No doubt there was a small gathering of persons, interested in the settlement of this case, collected upon the verandah outside the Munsif's Court at the time when these documents were put in an envelope, which according to the recollection of the witnesses was open and handed over to the accused. The accused was at the time (it was some time in the afternoon) busily engaged in Court. He was fetched out of Court and according to these witnesses, the documents contained in the envelope were handed to Alay Ahmad. One of the witnesses said that Mujtaba Husain, who handed them over, said: 'I entrust them to you.' That he thereupon looked at them, which means, of course, that he took them out of the envelope and gave them a sufficient external inspection to enable him to identify them and to know what was in the envelope. He put them back and went back to Court; that nobody read them on that occasion and the idea of their being read presumably never entered into anybody's head. So far as I can see, there is no reason in the world why they should have been read on that occasion.

Mujtaba says that they were not taken out of the envelope, but that Fyaz Husain told the pleader the nature of the docu-

ments. Upon this he was flatly contradicted by the witnesses I have just mentioned, and he himself on a later date, when he seems to have forgotten what he had sworn before, said that the accused took them out of the envelope. Whether witness 4, Samin Husain, was a discovery made by the prosecution with a view to patching up the very considerable number of inconsistencies which existed in the case or it was desired to strengthen the evidence of Mujtaba, is uncertain. But the strange point about his evidence is this: that whereas he went further than anybody else had had the courage to do up to the time he was called and actually committed himself to the statement that Alay Ahmad not only took them out of the envelope but carefully and fully read the documents through and that he did it in such a fashion that he (Samin Husain) was able to read their contents as well—I might mention by the way that if I did not think that enough had already been heard of this case I should have unhesitatingly directed this man's prosecution for perjury—he apparently had never been heard of in connexion with this case until 4th September. He was not called at the hearing of the civil case, although his evidence, if true, would have been vital.

He was not mentioned in the applications or orders which came before or were made by the Subordinate Judge and at the hearing before the Magistrate, his presence at the handing over of the envelope, which could not, if his evidence is true, have failed to have been observed by the witnesses who were present, was not mentioned by a single witness either by Mujtaba or Abrar Husain or Ejaz Husain. This is a most significant fact which has been entirely missed by the Magistrate and by the Sessions Judge. I do not think that either of the Courts below appreciated the difficulties of accepting the evidence adduced by the prosecution. Certainly neither of them attempted adequately to deal with them. As I have already said, it leaves in my mind considerable doubt; and upon the merits I think the case against the accused has not been made out. For the reasons given in this judgment and that taken as a whole the investigation and trial of this matter from first to last have been in the highest degree unsatis-

factory, I quash the conviction and direct that the fine, if paid, be refunded.

V.B./R.K. Conviction quashed.

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PIGGOTT AND WALSH, JJ.

Raghunandan Ahir and others—Plaintiff—Appellants.

v.

Sheo Nandan Ahir—Defendant—Respondent.

First Appeal No. 71 of 1916, Decided on 2nd August 1918, from decree of Sub-Judge, Azamgarh, D/- 7th December 1915.

U. P. Land Revenue Act (1901), Ss. 233-K—Manager of joint Hindu family by fraud on minor's members obtaining favourable partition—Suit by minors in civil Court for declaration that properties are joint is not barred.

Where the managing member of a joint Hindu family practised a fraud upon the infant members of the family and obtained a favourable partition of the joint family properties through the Revenue Courts:

Held: that a suit by the minors in the civil Court for a declaration that the properties were still joint was not barred by S. 233-K.

[P 174 C 1]

Per Walsh, J.—Once it is established that, whether by his own fraud or by neglect amounting to recklessness or wilfulness on the part of the guardian, the managing member of a joint Hindu family has robbed the infant members of the family, no question of procedure or technical refinement can be allowed to stand in the way of the civil Court, before which the matter is brought, compelling him to disgorge the proceeds of his robbery.

[P 174 C 1]

S. A. Haidar and S. M. Sulaiman—for Appellants.

Iqbal Ahmad—for Respondents.

Walsh, J.—In my opinion no question of law arises in this suit. The suit is brought by two youths who were at the commencement of the suit minors, namely Raghunandan Ahir and Jagnandan Ahir, against their half-brother Sheo Nandan, the son of a former wife of their father, for a declaration that the property mentioned in the schedule of the plaint was joint with the family property, and further alleging, though it is difficult to say that this was a definite form of relief, that certain proceedings with reference to the partition of the shares in such property brought in the Revenue Court were improperly brought by the defendant. The property consists of two categories: (a) property admittedly ancestral; (b) property comprised in certain purchases made bet-

ween the years 1902 and 1907. It is of course with reference to the property in list B that the controversy arises. At the time when all these purchases were made both the plaintiffs were under age and it therefore may be safely assumed that they knew nothing about the circumstances. At the time of the earliest purchase one of them was not born. The properties were bought by the defendant to some extent in his own name, and to some extent in his own names and that of one or other of the plaintiffs. It was necessary for us at the first hearing of the appeal to remit a certain issue of fact, the most important issue of fact, upon the merits in the case for decision by the first Court.

Unfortunately, as too frequently happens when technical issues are raised in a suit, the Court below overlooked what was really the fundamental question of fact in the case. It has now been found as a fact that at the time when these purchases were made the family was joint and the defendant was the managing member thereof. That decision is obviously right. Apart from the direct evidence upon the point, all the circumstances pointed in that direction and it would indeed be sufficient to ask why if this man had separated from his brothers and was buying the property with his own separately acquired funds, he should drag in his brothers' names at all. Of course in the case of dealings by members of a joint Hindu family, it is not unusual and not improper that property should be purchased and held in the names of one or other of the members of the family, but it must be obvious to anyone of common sense that that practice holds out considerable temptations to persons who are not above taking advantage of the position of junior members of the family. Judging from the cases which come up in appeal before this Court, it happens much too frequently that where there are infant defenceless members of the family, the managing member takes advantage of the circumstance to commit the mean and contemptible act of defrauding his infant brothers in order to enrich himself, and where a charge of that sort is made in a suit, as it was undoubtedly made in this suit, it is the duty of the trial Court to ascertain the real facts and the merits of the allegation. In this

case it is now established beyond controversy that at the time of the proceedings in the Revenue Court, Sheonandan knew perfectly well that this was joint property in which his infant brothers were interested equally with himself.

Sometime in 1913, the date is not precisely ascertained nor is it material, Sheonandan bethought 'himself' of applying to the Revenue Court for a partition of the mahal in which these properties were situated. The only other persons interested of course were these two boys, who at that time were aged about 13 and 11. It is not very important but it does appear that no formal guardian is, as a matter of procedure, necessary to the proceedings in the Revenue Court, at any rate no formal appointment was made and no inquiry of any sort or kind as to the fitness or otherwise of any person to look after the interests of these two brothers took place. The natural guardian was the mother, the second wife, an apparently ignorant, certainly illiterate, Ahir of 40 years of age, and judging from the observations of the trial Court of somewhat doubtful integrity. It is difficult of course, if not impossible, to say what passed through the mind of Sheonandan.

It is unlikely in my view that he is possessed of sufficient intelligence to foresee the consequences which actually occurred of the scheme which he undoubtedly embarked upon. The probability is that it was suggested to him by somebody to put in an application in the Revenue Court for partition fortified with the title deeds recording clearly and distinctly the shares in which the property was supposed to be owned, and to suggest to the ignorant, old mother that he the managing member of the family, was well able to look after the necessary proceedings in the partition Court and that although it was necessary for her to act as guardian for these children, the less she interfered in the matter the better it would be for herself and everybody else, and in that way to lull her into a sense of security so that in fact there should be no real opposition in the partition proceedings. Whether that is the intention with which Sheonandan started out upon this enterprise, as I have said it is impossible to say with confidence. From the point of view of moral integrity there is no difference between a scheme of that sort started in the hope

that there would be no opposition from an ignorant person who knows nothing about the proceedings, and a scheme in which the opposition was by anticipation rendered ineffective. What happened is remarkable in its significance and convinces me that Sheonandan had more to do with the proceedings in the Revenue Court on behalf of the infants than appears by any evidence in the case. Whether the notice issued under the Land Revenue Act gave information to this ignorant old woman, in such a way as to draw her attention to the necessity of her taking any active steps by way of objection to defend the interests of the infants, does not appear, but no doubt everything was legally and properly done and notice issued under the proper section so as to call upon any person asserting his title to come in and make good his case. Within the time limited by the Act nothing was done. Late in 1913, the document is not before us, an objection was put in which was really out of time.

On 11th July 1914 an objection was put in before the Collector asserting substantially the infants' case. The clear and forcible language in which that objection was framed satisfies me that it was drawn up by a skilled person who had been instructed more or less as to the true facts. The contrast which impresses me is between the total absence of anything of the kind during the period when objection could lawfully be made and the expert objection which was ultimately filed when it was too late. That objection was dismissed by the Assistant Collector three days afterwards as being out of time. An appeal was then launched to the Commissioner who felt himself compelled to dismiss it, pointing out that, although the grounds of appeal gave excellent reasons why the objection ought to be heard, it gave no reasons as to why it was not presented in proper time. The result was that Sheonandan got what he wanted. His plan succeeded and he was from that date possessed of a decision apportioning this mahal in his favour, awarding if the term is a proper one, to him property which he knew perfectly well belonged to his infant half-brothers.

Had that unfortunate result been arrived at by honest and proper proceedings in which no fraud had been practised

either upon the opponent or upon the Court, and the objectors had been persons sui juris to whom proper notice had been issued and who were themselves to blame if they did not appear to support their objection, in our view, although upon the view we take of the facts it is not necessary to decide that point, the order of the Revenue Court would have been a fatal objection to this suit. A good deal of discussion has taken place about the various authorities upon this point, but we think that for the time being it must be taken that the decision in *Bijai Misir v. Kali Prasad Misir* (1), adopting the view of the Full Bench case of *Muhammad Sadiq v. Laute Ram* (2), must be accepted by this and other Courts as finally laying down the ruling upon the interpretation of this subsection, namely, 233-K, but questions of limitation, res judicata, etc., can have no force where fraud is established. A litigant cannot be allowed to set up his own fraud. As a matter of form it may be open to question what is the better or correct method of questioning proceedings obtained in the way these proceedings in the Revenue Court were obtained in an ordinary suit in the civil Court. It may be open to do it by review, although the question would at once arise whether a Revenue Court was able to review its own proceedings on these grounds. It may be done by a suit to set aside or possibly, as in England, it may be done by a suit for possession or for a declaration of title, waiting until the defendant sets up the order in his favour and then showing by rejoinder that that order was of no legal value. In this case, as I have said, the plaint was for a declaration of title and by an addition made by a subsequent amendment claimed a declaration that the proceedings in the partition case were fraudulent.

We do not think that we can make a declaration in that form, but after all that is a matter of detail. The learned Judge who tried the case in the first instance definitely held that nothing had been suggested to lead him to think that the defendant had practised any fraud in the partition proceedings. He did not know of course what we know now that the whole of these purchases had been

(1) [1917] 39 All. 469=41 I. C. 912 (F. B.).

(2) [1901] 23 All. 291 (F. B.).

made out of joint family funds, but we think in any case he took too narrow a view. I propose shortly, as we are differing from him, to examine the evidence in this suit as throwing light upon these partition proceedings. It is remarkably meagre. A person named Zaitun, whose daughter was then married to Raghunandan, was called and said that he was the general attorney for the mother but he swore that he took no part in the partition proceedings except in 1915, when it was of course too late to make an application for stay, which was struck off. The mother who was called professed entire ignorance of the partition case. Possibly she was putting her evidence too high, but her cross-examination is significant. Not a single relevant question was put to her. She was never asked with regard to the notice issued in the partition proceedings or how much she understood what part she took as guardian, whether she looked after the case in person or whether she employed any professional gentleman to advise and assist her. No question of any sort was put to her. That is the sum and substance of the direct evidence on behalf of the plaintiffs. The defendant came into the box and he endeavoured to support his case by making out an alleged separation.

That, as we have said, has been proved to be false. He said that the Musammat looked after the objections, whatever that means, and that she looked after the appeal, whatever that means, and that she was present in Court. Of course it is absurd to suppose for a single moment that he expected anybody to believe that this illiterate woman of forty could possibly look after objections and the appeal in any real sense or know what she had to do in preparing the necessary papers. He also said that one Ghulam Mohammad looked after the case, whatever that means. So that when any specific allegation in evidence was made as to the actual part that anybody took, there was a sort of feeble and vague allegation that between them Zaitun, the Musammat herself, and this Ghulam Mohammad, looked after the case for the infants. Now what the defendant had undertaken to prove was something very different. In his written statement he said that he plaintiffs, under the guardianship of their mother and lawful guar-

dian frequently took objections regarding the amount of shares and other matters and were unsuccessful after fighting up to the appellate Court. There is not a word of truth in that allegation. There was no fight. The proceedings were in substance *ex parte*. The order was obtained, in the absence of anybody representing the infants, by a false and fraudulent representation made by this man that the deeds which he had taken in his own name and in the names of his brothers represented the true interests of the parties. An *ex parte* proceeding where, owing to default or for unforeseen accident either party is absent, is a proceeding which is known to the law as *uberrima fides*, that is to say, the law rightly lays the duty upon a person making a statement to a Court in the absence of the other side to be particularly careful not to mislead it. It is obvious that this must be so. It would be a shocking thing, merely because an absent party did not consider it worthwhile to dispute the real facts, that an order obtained upon false facts in his absence should be held to be binding upon him. There is no analogy between a case such as this and that which was cited to us on behalf of the respondent, where it was held that when once a suit has been fought and determined by parties *sui juris* affecting their rights in the ordinary way by conflict of evidence, a fresh suit cannot be brought in order to decide that the prior suit was wrongly decided upon false evidence, because the question whether the evidence is false or true is the question which has to be determined and has been set at rest for ever in the prior suit. That cannot be predicated of a statement made *ex parte* for the purpose of obtaining an order of the Court.

In the course of the judgment of the Court below it appears that Zaitun and the Musammat made an unfavourable impression upon the learned Judge. It may be that they are untrustworthy persons. We do not see how in the circumstances of this case that can help the defendant. He knew the truth better than anybody, and where a person initiates a proceeding for the purpose of perpetrating a fraud upon persons who were unable to look after themselves, it does not, to my mind at any rate, assist him to be able to show that these persons would have been properly looked after if the person whose duty was to do it had been more honest

than he was. Once it is established that whether by his own fraud or by neglect amounting to recklessness or wilfulness on the part of the guardian the managing member of a joint Hindu family has robbed the infant members of the family, no question of procedure or technical refinement can be allowed to stand in the way of the civil Court, before which the matter is brought, compelling him to disgorge the proceeds of his robbery. This is really the statement of the defendant's conduct. As I have already said, I think the suit is maintainable and that the plaintiffs are entitled to a declaration that this property in list B is joint family property, that they are entitled jointly to $\frac{2}{3}$ rd, the defendant being entitled to the other $\frac{1}{3}$ rd, and that upon the facts found, the proceedings in the Revenue Court which terminated in August 1914 do not invalidate the plaintiffs' title. The appeal must be allowed with costs here and in the Court below, including fees on the higher scale.

Piggott, J.—I concur in the proposed order and in the reasons given for the same. The suit as brought was one for establishment of the proprietary title threatened by a course of fraudulent conduct on the part of the defendant. I do not think that cognizance of the same by a civil Court was barred merely because one step in the course of the fraud in question, as alleged in the plaint, was the presentation of a certain application for partition in the Court of an Assistant Collector. The distinguishing features of this case, as compared with other reported cases, are the minority of the plaintiffs during the period covered by the origin of their cause of action, and the circumstances under which the defendant obtained the order of the Assistant Collector refusing to adjudicate upon the objection filed on behalf of the present plaintiffs. I see no reason to dissent from the conclusion arrived at by my learned brother. There was some question in the Court below as to the effect of S. 42, Specific Relief Act, on the suit; but as the case stands I think the finding, that the plaintiffs were on the date of the presentation of their plaint in constructive possession of the shares claimed by them, is warranted by the evidence. They were certainly in such possession so long as they remained in law members of a joint undivided Hindu family with their

half-brother Sheonandan, of which the said Sheonandan was the manager. If it was an essential part of the defendant's case that he had ousted them from possession, it lay upon him to satisfy the Court when and how he did so. His own plea was that he had separated from his father before the birth of either of these plaintiffs and that the property really in controversy, namely the property specified in list B appended to the plaint, had been acquired in the first instance, and had always been possessed by the parties respectively, in accordance with the shares shown in the revenue papers. This plea has been found to be false and the evidence on the point is conclusive against Sheonandan. I see no reason why it should not be held that the possession which the plaintiffs undoubtedly enjoyed up to within a year or two of the institution of the suit must be presumed, in the absence of a finding to the contrary, to have continued up to the date of the institution of the same. On this finding a decree for a declaration in the terms suggested seems the proper relief to give to the plaintiffs.

V.B./R.K.

Appeal decreed.

A. I. R. 1919 Allahabad 174

WALLACH, J.

Desraj Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 423 of 1919, Decided on 5th August 1919, from order of Dist. Magistrate, Mainpuri, D/- 4th July 1919.

Criminal P. C. (1898), Ss. 110 and 437—Person discharged in inquiry under S. 110—District Magistrate can direct further inquiry.

Under S. 437 a District Magistrate has jurisdiction to direct further inquiry in a case where a person has been discharged in an inquiry under S. 110, Criminal P. C. [P 175 C 1]

Mangal Prasad Bhargava—for Appellant.

Asst. Govt. Advocate—for the Crown.

Judgment.—The applicant, *Desraj*, has been discharged by a Magistrate of the First Class in an inquiry under S. 110, Criminal P. C. The District Magistrate of Mainpuri ordered a further inquiry under S. 437. Against that order *Desraj* has applied in revision to this Court. In *Kharga v. Emperor* (1), a Divisional Bench of this Court has held that a District Magistrate has jurisdiction

(1) A. I. R. 1914 All. 158=22 I. C. 183=36 All. 147.

to direct further inquiry in a case where a person has been discharged in an inquiry under S. 110, Criminal P. C. I am bound by that ruling and therefore have to hold that the District Magistrate had jurisdiction to pass the order which is attacked in this revision. The only question that remains is whether he was justified, in the exercise of his jurisdiction, in ordering a further inquiry. I am not prepared to tie Magistrate's hands, and to hold that he was not justified in passing the order and therefore reject this application.

V.B./R.K.

*Application rejected.***A. I. R. 1919 Allahabad 175 (1)**

WALLACH, J.

Emperor

v.

Mohomed Naqi Husain—Accused.

Criminal Ref. No. 451 of 1919, Decided on 29-7-1919, by Sess. Judge, Aligarh.

Criminal P. C. (1898), S. 195 (1) (a)—Sanction to prosecute can only be given by public servant concerned or by some public servant to whom he is subordinate — Penal Code S. 182.

A addressed a letter to the Collector of the district making certain charges against an official of the district. It was found that in respect of this letter he had committed an offence under S. 182, I. P. C., and the Subdivisional Magistrate sanctioned his prosecution:

Held: that the Subdivisional Magistrate had no jurisdiction to sanction the prosecution, as under S. 195 (1) (a), Criminal P. C., such sanction could only be given by the public servant concerned or by some public servant to whom he was subordinate, and, with reference to S. 182, I. P. C., the proper officer to sanction the prosecution was the Magistrate of the district.

[P 175 C 1, 2]

Judgment.—This is a reference from the Sessions Judge of Aligarh recommending that an order directing the prosecution of one Mohomed Naqi Husain for an offence under S. 182, I. P. C., be set aside as having been directed by the Subdivisional Officer, Mr. R. H. Niblett, who had no jurisdiction to pass the order. Together with the reference the Magistrate's explanation has also been forwarded to this Court. Mohomed Naqi Husain had complained to the Collector of Aligarh by means of a letter, making certain charges against Mohomed Ayub, pound-keeper of Chama. If an offence under S. 182, I. P. C., has been committed with reference to the letter complaining against the pound-keeper, then under S. 195, Cl. (1) (a), Criminal P. C., no

Court can take cognizance of the offence without the previous sanction or the complaint of the public servant concerned or of some public servant to whom he is subordinate. The public servant concerned with reference to S. 182, I. P. C., is clearly the District Magistrate. The Subdivisional Officer does not take the place of the District Magistrate and cannot usurp the District Magistrate's powers for the purpose of giving jurisdiction under S. 195, Cl. (1) (a), Criminal P. C., to a Court for the purpose of trying the alleged offence. I therefore accept the reference of the learned Sessions Judge and set aside the order of Mr. Niblett, Magistrate, First Class, dated 5th June 1919, directing the prosecution of Mohomed Naqi Husain under S. 182, I. P. C., with respect to the letter mentioned in that order.

V B./R.K.

*Order set aside.***A. I. R. 1919 Allahabad 175 (2)**

RAFIQUE AND LINDSAY, JJ.

Balbhader Prasad and others—Defendants—Appellants.

v.

Prag Datt and others—Plaintiffs—Respondents.

First Appeal No. 343 of 1916, Decided on 3rd March 1919, against decision of Addl. Sub-Judge, Cawnpore, D/- 3-8-1916.

(a) Specific Relief Act (1877), S. 42—Alienation by transferee from female with limited estate or by person holding under her—Suit by reversioner under S. 42 is competent—Hindu law, Reversioner.

An alienation made by a transferee from a Hindu female in possession with a limited estate or by a stranger in possession holding under her furnishes the nearest reversioner with a cause of action for a declaratory suit and having regard to the language of S. 42, Specific Relief Act, such a suit is maintainable.

[P 179 C 2]

(b) Hindu Law—Reversioner—Nearest reversioners right to property of last male owner—Scope of "right" explained—Specific Relief Act (1877), S. 42.

The nearest reversioners have a "right" to the property of the last male owner. The expression "right" includes all rights present future, vested or contingent, and the right of a reversioner under Hindu law the denial of which may furnish him with a cause of action for a suit under S. 42, Specific Relief Act.

[P 179 C 2]

(c) Specific Relief Act (1877), S. 42—Granting of relief is discretionary—High Court will not interfere—Civil P. C. (1908), S. 115.

If a plaintiff in a suit under S. 42 can show a cause of action it does not follow that the Court must necessarily give him relief by declaration. The granting of the relief is discretionary and when the Court has not exercised the discretion

so vested in it by law wrongly or arbitrarily, the High Court should not interfere with its decree.

[P 179 C 2; P 180 C 1]

(d) Limitation Act (1908), Art. 120 — Suit for declaration—Art. 120 applies.

A suit to obtain a declaration of nullity in respect of (a) an adoption and consequent entries in the revenue papers, (b) a mortgage executed by one of the defendants and (c) mutation of names after the death of the last female holder must be brought within the period prescribed by Art. 120.

[P 180 C 2]

(e) Record of Rights—Mutation proceedings—Person adversely affected cannot be presumed to have consented.

In the absence of evidence there can be no presumption that the persons adversely affected by mutation proceedings consented thereto.

[P 181 C 1]

(f) Will—Oral will—Evidence must be precise and definite.

In order to establish an oral will the evidence must be precise and explicit. The statements of witnesses who are at variance as to the time the place and the words used by the deceased are worthless.

[P 181 C 2]

K. N. Katju—for Appellant.

Sunder Lal, Tej Bahadur Sapru, Baldeo Ram Dave, Sham Nath Mushran and Durga Charan Banerji—for Respondents.

Judgment.—The parties to this appeal are descended from a common ancestor except defendants 2 and 6. One Sahab Rai Shukul, as the pedigree given at p. 9 of the paper-book will show had three sons, namely, Debi Din, Bhawani Din and Jeorakhan. We are concerned here with the descendants of Bhawani Din and Jeorakhan only. The plaintiffs in the present case are two of the grandsons of Bhawani Din and the defendants, with the exception of defendants 2 and 6, are the descendants of Jeorakhan. Jeorakhan died more than 45 years prior to the institution of the suit leaving him surviving a widow Mt. Sita Kunwar and three daughters Mt. Makhan Kunwar, Mt. Rani Kunwar and Mt. Tulsha Kunwar. Jeorakhan had adopted one of his nephews, namely Sheva Das who predeceased him. Sheva Das left two children a son and a daughter called Balgobind and Mt. Bakhta Kunwar respectively. Balgobind predeceased Jeorakhan. Mt. Bakhta Kunwar is the mother of Balbhadar Prasad defendant 3 who is one of the appellants before us. Mt. Makhan Kunwar had a son Mangli Prasad who died leaving him surviving two sons named Gargi Din and Brij Nandan. They are defendants 4 and 5 in the suit and appellants 2 and 3 before us. Mt. Rani Kunwar was defendant 1 and was

a party to this appeal as a respondent but we are told that she is dead now. Mt. Tulsha Kunwar had a son named Durga Prasad who died leaving him surviving a daughter called Chiti, who is no party to the suit.

Jeorakhan owned some immovable property. He had shares in the villages Patari, Merekhpur and Madarpur. In 1852 he and two other persons purchased the equity of redemption of the village of Said Alipur. In January 1870 he executed a deed of gift of his shares in the villages Patari and Merakhpur in favour of his three daughters and his granddaughter Mt. Bakhta Kunwar. He retained Madarpur and the equity of redemption in Said Alipur. After his death mutation of names was effected in favour of his widow Mt. Sita Kunwar in respect of the villages Madarpur and Said Alipur. Mt. Sita Kunwar died within a year or two of her husband's death. After her death a dispute arose between her daughters and her granddaughter Mt. Bakhta Kunwar on the one side and the descendants of Bhawani Din on the other. The latter claimed the share of Jeorakhan in Madarpur and his right of redemption in Said Alipur under an oral will from Mt. Sita Kunwar. On the other hand her daughters and her grand daughter claimed the property on the same ground that is, an oral will from Mt. Sita Kunwar, in their favour. The mutation of names was allowed to the daughters and the granddaughter of Mt. Sita Kunwar but we cannot say now on the materials on the record on what ground the order of mutation was made. No copy of that order has been produced.

After the mutation order in favour of the ladies the name of each of them was entered in respect of a one-fourth share and each of them enjoyed the property separately. Mt. Makhan Kunwar died about 1875 and after her death the name of her son Mangli Prasad was entered in the revenue papers in respect of her one-fourth share. On the death of Mangli Prasad in 1900, the names of his two sons Gargi Din and Brij Nandan were entered in respect of the same property in the revenue papers. Mt. Bakhta Kunwar died about 1885 and the name of her son Balbhadar Prasad was entered in her place in the revenue papers. Mt. Tulsha Kunwar died some time in 1907

and the name of her son Durga Prasad was substituted for her name in the revenue records. Durga Prasad died on 24th October 1915 and instead of his daughter's name being entered in his place, the name of his cousin Narain Prasad was recorded in the Government papers on the allegation that he was the adopted son of Mt. Tulsha Kunwar. He is defendant 2. In 1911 Gargi Din, Brij Nandan, Mt. Rani Kunwar, Durga Prasad, Narain Prasad and Balbhadar sued to redeem the mortgage of Said Alipur. It should be observed here that the mortgage was created in 1847 and that it was a usufructuary mortgage for Rs. 1,700.

The abovementioned persons stated in their plaint that their ancestor Jeorakhan had with two others purchased the equity of redemption of the mortgagor and that they as heirs of Jeorakhan were entitled to redeem the mortgage. It was further stated that in case it was found that they, i.e., Gargi Din, Brij Nandan, Durga Paashad and Balbhadar, were not the legal representatives of Jeorakhan and could not sue as such for redemption, Mt. Rani Kunwar who represented the full rights of her father could maintain the action. Moreover, Gargi Din, Brij Nandan, Narain Prasad and Balbhadar had purchased the rights of one of the sons of Roshan Khan, a co-purchaser with Jeorakhan of the equity of redemption, and could therefore join in the suit. The claim was contested but a decree was passed in favour of all the plaintiffs on 27th June 1911. The redemption money was paid and mutation was effected in favour of the then plaintiffs on 30th March 1912.

On 6th May 1914, Gargi Din executed a deed of simple mortgage in favour of Lala Bala Prasad, defendant 6, in respect of an eight-annas share in Mahal Mangli Prashad in Mauza Madarpur. On 8th December 1915 Prag and Puttan, two of the grandsons of Bhawani Din and grand-nephews of Jeorakhan, instituted the suit out of which this appeal has arisen asking for three declarations, viz., that (a) it may be declared that Narayan Prasad is not the adopted son of Mt. Tulsha Kunwar. The entry of the name of Narayan Prasad, defendant 2, in the revenue papers on the basis of the statement of Mt. Rani Kunwar, dated 11th April 1915, and those of Narayan Prasad,

dated 29th March 1915 and 14th May 1915, respectively, in place of that of Durga Prasad, in respect of the zamindari shares, detailed below, i.e., an 8-pies share in Mauza Said Alipur, Mahal Badri Prasad, a 2-annas share, with reference to village and 16-annas share with reference to Mahal in Mauza Madarpur Tassadduq Ali, Mahal Tulsha Kunwar, and a 2 1/4-pies share in Mauza Bagahi, Mahal Badri Singh, and all the proceedings and the order directing the mutation of names to be effected in favour of Narain Prasad after the death of Mt. Rani Kunwar, may be declared to be null and void and ineffectual as against the right of the plaintiffs as the reversioners of Jeorakhan Shukul; (b) It may be declared that the mortgage deed, dated and registered on 16th May 1914, executed by Gargi Din, defendant 4, in favour of Bala Prasad, would become null and void and ineffectual, after the death of Mt. Rani Kunwar as against the right of the plaintiffs as the reversioners of Jeorakhan Shukul; (c) It may be declared that after the death of Mt. Rani Kunwar the (mutation) proceedings and the order for mutation of names in favour of defendants 1 to 5, and also in favour of Durga Prasad, deceased, passed by the Revenue Court on 30th March 1912, on the basis of a decree for redemption, dated 27th June 1911, and the deed for delivery of possession, dated 8th December 1911, filed in *Suit No. 484* of 1910, of the Court of the Subordinate Judge of Cawnpore *Chhita* and *Rani Kunwar v. Kundan Lal* will become null and void and ineffectual as against the rights of the plaintiffs as the reversioners of Jeorakhan Shukul. For the defence several pleas were advanced in bar of the claim. It was urged on behalf of the defence that:

1. Plaintiffs have no cause of action for the present suit.
2. The claim is barred by limitation.
3. After the death of Mt. Sita Kunwar the property in suit was divided between her daughters and granddaughter with the consent of the next reversioners and that division is binding and effectual.
4. The property in suit devolved on the daughters and the granddaughter under an oral will of Jeorakhan and they took it as full owners.
5. Plaintiffs should pay the proportionate amount of redemption money and costs of the re-

demption suit. The learned Subordinate Judge disallowed the objections for the defence and decreed the claim. Three of the defendants, namely Balbhadar Prasad, son of Bakhta Kunwar, and Gargi Din and Brij Nandan, sons of Mangli Prasad and grandsons of Makhan Kunwar, have preferred this appeal. They challenge the decree against them on the grounds mentioned above. Before proceeding to consider the arguments on behalf of the appellants we must note first that the objections of the latter are directed against reliefs 2 and 3. It is conceded that the appellants are not concerned in, and do not challenge, relief 1 which relates to Narain Prasad's alleged adoption and his getting possession of part of the property in suit on the death of Durga Prasad. The decree in favour of the plaintiffs with regard to relief 1 will therefore stand even if the appellants make out a case with regard to the other reliefs. We take up the plea of the want of cause of section first. The arguments for the appellants are different in respect of each of the two pleas Nos. 2 and 3. It is contended that the plaintiffs have no right to complain of the redemption suit, inasmuch as it was for the benefit of the estate and it did not in any way invade or injure their rights as reversioners. It appears that Mt. Rani Kunwar, the sole surviving daughter of Jeorakhan, had joined with her as plaintiffs in the suit Durga Prasad, Balbhadar, Gargi Din and Brij Nandan on the allegation that they also were the legal representatives of her deceased father.

It was also stated in the plaint that in case the Court was of opinion that the said four persons were not the legal representatives of Jeorakhan, Mt. Rani Kunwar herself could maintain the action. Another allegation in the plaint was that Balbhadar and Gargi Din with some others had purchased the rights of one of the sons of Roshan Khan, a co-purchaser of the equity of redemption with Jeorakhan. The plaintiffs in the present case have based their cause of action on the allegation made in the plaint of the redemption suit with regard to Balbhadar and others being the legal representatives of Jeorakhan. The appellants' contention that the said plaint also contained the allegation that Mt. Rani Kunwar alone could maintain the

suit and that Balbhadar and Gargi Din had purchased the rights of Roshan Khan's son is of no force, as the judgment and the decree in the redemption suit have not been filed and we cannot say in what capacity the decree was passed in favour of Balbadhar and others. It is not denied that after the decree in redemption suit and the redemption of the property possession was obtained and mutation of names effected in favour of Balbhadar, Durga Prasad, Gargi Din and Brij Nandan. If the decree for redemption was passed in favour of Mt. Rani Kunwar alone as the legal representative of Jeorakhan, and in favour of Balbhadar and Gargi Din as purchasers from Roshan Khan's son, why then were the names of Durga Prasad and Brij Nandan entered in the revenue papers and how did they get possession of the redeemed property? We think that the proceedings subsequent to the redemption decree show that at least as far as Durga Prasad and Brij Nandan are concerned, the decree was interpreted to mean that they had obtained it as legal representatives of Jeorakhan on the allegations made in the plaint and obtained possession as such. The conduct of Mt. Rani Kunwar, in joining strangers as co-plaintiffs with her, on the ground that they were her father's legal representatives and giving them possession over part of the redeemed property, distinctly amounted to an invasion of the interests of her father's reversioners. The plaintiffs in the present suit have therefore in our opinion, a cause of action in respect of relief No. 3.

The main attack is however directed against relief No. 2, which relates to the mortgage created by Gargi Din in favour of Bala Prasad, defendant 6, on 16th May 1914. It is argued that a reversioner is entitled to complain of the act of a Hindu female, who has a limited estate, if her act is beyond the authority given to her by the Hindu law and injuriously affects his rights. He can ask for a declaration that it will be null and void as against him after her death and if the act is in the nature of waste, she can be restrained by injunction from committing it in future. But if the reversioner chooses to pass by a transfer made by her which he considers unjustifiable and which injuriously affects him, he cannot question the alienation made by her transferee. No cause of action accrues to him on the

second transfer, though the female tenant be alive at the time. She is no party to the second transfer and a reversioner can complain only of the dealings with the property of a female with a limited interest if her dealings are unjustifiable and injurious to his interests. The only case, it is said, in which a reversioner has a right of action against the transferee of a female with a limited estate is when the transferee commits waste. In the present case the giving of mortgage by Gargi Din cannot be said to be an act of waste. In support of this contention the following authorities are relied upon:

Hindu Woman's Estate (Siroya), pp. 288-291; Trevelyan's Hindu Law, p. 500; *Kamavadhani Venkata Subbaiya v. Joysa Narasingappa* (1), *Mata Din v. Sheik Ahmad Ali* (2). The passages in the first-mentioned work at pp. 288 and 291 are as follows:

"When a Hindu widow is no party to the alienation impeached by reversioners they are not entitled to a declaration that the alienation is void and does not bind them:" p. 288.

A reversioner is entitled to restrain unlawful acts of a stranger holding under the widow," p. 291, Cl. q.

The first passage given at p. 288 is a reproduction word for word from *Mata Din v. Sheik Ahmad Ali* (2). The report does not give the name of the case, the judgment of the Court, the facts of the case and the allegations on which the reversioners sought relief or what reliefs were sought. It does not appear whether the note in the report refers to an opinion expressed on an issue distinctly raised in the case or was a mere obiter dictum. The second passage relied upon by the appellants refers to the right of a reversioner to restrain the unlawful acts of a stranger, that is, to one of the remedies of a reversioner. It does not necessarily imply that an alienation by a stranger holding under a Hindu widow gives no cause of action to the reversioner. Another learned writer on Hindu law (a Hindu himself) has expressed a contrary opinion. After discussing the rights of a reversioner he says that

"it will thus be seen that the next immediate reversioner can sue for a declaration that an alienation by a widow or other limited owner or that an alienation by an assignee from her or that an act which is injurious to the estate of the reversioner is voidable at his instance except

(1) [1866] 3 M. H. C. R. 116

(2) [1912] 34 All. 213=13 I. C. 976=15 O. C. 49=39 I. A. 49 (P.C.)

during the widow's lifetime" vide Ramkrishna Hindu's Law, Vol. 2, p. 297.

Trevelyan's Hindu law is cited to show that the learned author nowhere says that a reversioner has a right of suit in respect of a transfer made by the assignee or the transferee from a Hindu widow; all that the learned author lays down is that the reversioner can sue in respect of an act of waste committed by the transferee. Reliance is placed on the passage at p. 501 under the heading of "Suit to restrain waste." The case of *Kamavadhani Venkata Subbaiya v. Joysa Narasingappa* (1) is an authority for the proposition

"that a reversioner can sue to restrain a transferee from a Hindu female from injuring the property."

The point under discussion here was not raised in that case nor is it mentioned by Trevelyan. We cannot find in any of the cases or dicta cited before us definite authority for the proposition that an alienation by the transferee from a Hindu female in possession with a limited estate or by a stranger in possession holding under her does not furnish the nearest reversioner with a cause of action for a declaratory suit; and in view of the language of S. 42, Specific Relief Act, we are not prepared to hold that such a suit is not maintainable.

It cannot be denied that the nearest reversioners have a "right" to the property of the last male owner. The expression "right" includes all rights, present, future, vested or contingent, and as illustration (e) to S. 42 itself shows, the right of a reversioner under Hindu law. It may be that this latter right is nothing more than a spes successionis and incapable of transfer, but it is still recognised as a right the denial of which may furnish a cause of action for a suit under S. 42, Specific Relief Act.

Of course it does not follow that because a plaintiff in a suit under S. 42 can show a cause of action, the Court must necessarily give him relief by declaration. The granting of the relief is a matter of discretion. The lower Court in the exercise of its discretion under the circumstances of the present case has thought it fit to grant the relief with regard to the mortgage created by Gargi Din. Having regard to the pleadings in the case—the appellants having set up a title in the daughters and the granddaughter of Jeorakhan, wholly inconsis-

tent with and adverse to the rights of the plaintiffs as reversioners)—we consider we should not be justified in interfering with the decree of the lower Court passed in the deliberate exercise of the discretion with which it is vested by law. We do not think that the discretion was exercised by the lower Court wrongly or arbitrarily. Our view is not without authority—vide *Jaipal Kunwar v. Inder Bahadur Singh* (3), *Ram Autar Dube v. Badal Pandey* (4). We therefore reject the contention for the appellants. The second objection for the appellants is that the claim is barred by limitation. It is argued that a right to sue accrued to the plaintiffs on the following occasions on all of which they were alive: 1. The admission of Mt. Bakhta Kunwar to a share in property in suit, i. e., in 1873; 2. The mutation of names in favour of Mangli Prasad on the death of his mother Makhan Kunwar in 1875; 3. The mutation of names in favour of Balbhadhar on the death of his mother in 1885; 4. The mutation of names in favour of Gargi Din and Brij Nandan on the death of Mangli Prasad in 1900. It is contended that Art. 125, Lim. Act, which prescribes 12 years as the period within which a reversioner can bring a suit to have an alienation made by a limited owner declared invalid against him, applies to the case. The plaintiffs, it is said, in order to evade the Statute of Limitation, have based their claim on the dates of the adoption, the redemption suit and the mortgage by Gargi Din, ignoring the acts of the daughters of Jeorakhan which really affected the interests of the plaintiffs adversely. The object of the suit is to challenge the acts of the daughters of Jeorakhan by disputing the subsequent acts of those holding under them. In support of the contention the following cases are cited: *Jaggi v. Pirthi Pal* (5), *Kunwar Bahadur v. Bindrabai* (6).

We are unable to accede to the contention for the appellants. The case relied upon are not in point. The plaintiffs have not based their cause of action on acts done on the occasion mentioned above nor do they admit that any alienations or transfers were made by the daughters

of Jeorakhan. Moreover Jeorakhan's daughters could deal with their father's property in their lifetime and give the whole or part of it to persons not entitled to it for their lifetime only. In the present case if they gave some property to some members of the family whom they wanted to support and provide for they could do so for the period of their lives. In our opinion the plaintiffs were not bound under the law to seek a declaration in respect of the admission of Bakhta Kunwar or her son, or Makhan Kunwar's son or grandsons to the enjoyment of some portion of the property as long as one of Jeorakhan's daughters was alive. Nor are the plaintiffs barred under the Statute of Limitation from seeking the declarations which they seek now because they omitted to challenge the abovementioned acts of Jeorakhan's daughters. Art. 125 provides for the case of a reversioner, who seeks to challenge the alienation made by a Hindu female or other limited owner. In the present case, none of the acts complained of is an alienation by a female with a limited estate. The article of the Limitation Act applicable to the present case is Art. 120 and the suit has been brought within six years of the acts of the defendants that are objected to. We therefore hold that the claim of the plaintiffs is not barred by limitation.

The third point raised on behalf of the appellants is that when a transfer is made with the consent of the reversioners the transferees obtain an unassailable right and title. On the death of Mt. Sita Kunwar the reversioners to Jeorakhan were her daughter's sons, viz., Mangli Prasad and Durga Prasad. It is argued that the daughters of Sita Kunwar in admitting Mt. Bakhta Kunwar to a share and getting her names entered in respect of one-fourth of the property virtually transferred it to her, that Mangli Prasad and Durga Prasad raised no objection at the time and that we must presume that they consented to the transfer. Again on the death of Makhan Kuar, the reversioners to Jeorakhan were Durga Prasad and Mangli Prasad. The property entered in her name went to her son Mangli Prasad; Durga Prasad made no objection, and the argument is that it must be presumed that he consented to the transfer. On the death of Mangli Prasad the property standing in

(3) [1904] 26 All. 238=31 I. A. 67=7 O. C. 239=8 Sar 625 (P. C.).

(4) [1912] 17 I. C. 586.

(5) [1894] A. W. N. 134.

(6) A. I. R. 1915 All. 130=26 I. C. 737=37 All 195.

his name went to his sons and no objection was raised by Durga Prasad or the surviving daughters of Jeorakan. Balbhadar succeeded to his mother's property in the same way. Mt. Makhan's grandsons and Mt. Bakhta's sons are, it is said, therefore in rightful possession and their title is good and cannot be questioned. They are the appellants in the present case and the claim against them must fail. No evidence has been shown to us in support of the statement that the three daughters of Jeorakan gave a one-fourth share of the property to his granddaughter. Mt. Bakhta Kunwar in 1871 with the consent of the then presumptive reversioners Mangli Prasad and Durga Prasad. We have not got before us the mutation file of that time nor any papers to show whether any objections were or were not made by Mangli Prasad and Durga Prasad. We cannot presume their consent from the absence of evidence in the case. The same remarks apply to the obtaining of possession of Mangli Prasad, his sons and Balbhadhar Prasad over a portion of the property in question. We therefore disallow the contention of the appellants.

The fourth contention for the appellants is that the oral will in favour of the three daughters of Jeorakan and his granddaughter Mt. Bakhta Kunwar is proved. It is argued that the probabilities are in favour of such a will. Jeorakan was annoyed with his cousins and nephews because they had fought with him about the mutation of names on the death of Sheva Das. It was for that reason that he gifted more than one-half of his property to his three daughters and his granddaughter. He would naturally be inclined to leave the rest of his property to them also. The manner in which the property was dealt with by the daughters of Jeorakan is also pressed in argument to show that there must have been an oral will of the kind alleged on behalf of the defence. The statements of three witnesses, who were produced in the lower Court, are also relied upon in support of the will. The fact that Jeorakan had a dispute with his cousins and nephews, may have disposed him to give away the major portion of this property to his daughters and his granddaughter. It may be that he may have had a desire that the rest of his property should go to the same

person in the end, but the question we have to decide is whether, as a matter of fact, he did make an oral will. The statement of one Sheo Sabai, who was a nephew of Jeorakan, being the son of his brother Debi Din, is on the record. He was examined in the mutation proceedings in 1871 after the death of Mt. Sita Kunwar. He mentions no oral will of Mt. Sita Kunwar or of Jeorakan in favour of Jeorakan's daughters but, on the other hand, deposes to an oral Will of Mt. Sita Kunwar in favour of the nephews of Jeorakan. The disposition of the property by the daughters and the granddaughter of Jeorakan seems to have been made for the sake of convenience and out of mutual understanding. The conduct of the daughters and the grand-daughter of Jeorakan would not go to prove the alleged will. The oral evidence for the appellants is quite worthless. Jagan Nath, one of their witnesses, does not depose that Jeorakan made an oral will bequeathing the property to his daughters and grand-daughter. What he says is that Jeorakan before his death suggested to his wife Mt. Sita Kunwar that she should make a gift of the property to her daughters and grand-daughter. The three witnesses for the appellants are at variance as to the time, place and the words spoken by Jeorakan. It is impossible to hold on their evidence that Jeorakan made an oral will as is alleged by the defence. We agree with the lower Court and find that the alleged oral will has not been proved.

The last point that remains to be considered is that which is mentioned in the fifth ground of appeal. The appellants contend, and we think rightly, that before the plaintiffs get possession of their shares of Mauza Said Alipur they should pay proportionate costs of the redemption suit and of the redemption money. The amounts of both will have to be determined at the time when the plaintiffs come to ask for possession. Subject to this observation we uphold the decree of the lower Court. The appeal fails and we dismiss it. We allow costs to the plaintiffs-respondents, including in this Court fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 182

KNOX AND BANERJI, JJ.

Zafar Husain — Defendant—Appellant.

v.

Ummat-ur-Rahman — Plaintiff—Respondent.

Second Civil Appeal No. 686 of 1916, Decided on 3rd January 1919, from a decree of Addl. Judge., Farrukhabad.

(a) Mahomedan Law—Marriage—Husband falsely charging wife with adultery—Wife is entitled to sue for dissolution.

If a husband falsely charges his wife with adultery, she is entitled under the Mahomedan law to have it declared that her marriage has become dissolved. (1865) 3 W. R. 93, *not foll.*
[P 183 C 1, 2]

(b) Mahomedan Law—Marriage—Doctrine of laan is still operative.

The doctrine of laan is operative in Anglo-Mahomedan law and cannot be considered obsolete [P83 C 1]

Surendra Nath Sen—for Appellant.

S. M. Sulaiman — for Respondent.

Knox, J.—This second appeal arises out of a suit brought by Mt. Ummat-ur-Rahman, wife, against Zafar Hussain, her husband. The prayer by the plaintiff is that the marriage of the plaintiff with the defendant be dissolved. There is a further pray for damages and costs. The reason given is that the defendant has treated the plaintiff with cruelty, intends to kill her or cut off her nose, stated before several persons that the plaintiff had illicit intercourse with her brother Aziz-ur-Rahman, and imputed fornication to her. The written statement filed by Zafar Hussain is to the effect that the plaintiff's claim has been brought on false allegations. There was no ill-feeling between the plaintiff and himself nor quarrel. No charge has been made by the husband against the wife of misconduct with her brother. The story had been invented by the members of the wife's family. The plaintiff is literate and sensible and has always been obedient and doing her duty towards the defendant. The Court of first instance, i. e. the Subordinate Judge of Farrukhabad, is a Mahomedan by creed and he has gone very carefully into the case. He declared the marriage to be dissolved. The husband then went in appeal to the Additional District Judge of Farrukhabad. This Judge found that the civil Courts have jurisdiction to try suits of this nature. That the doctrine

of "laan" is still part of the Mahomedan law which has to be administered in Indian Courts. I shall refer to the doctrine of laan again. He found that the allegations of misconduct were as a matter of fact made by the husband, that there had been no retraction by the husband. He held as the result that the lady was entitled to claim judicial separation. He confirmed the decree of the Court of first instance.

He also found, upon the plea that no fair opportunity had been given to the husband to examine the witnesses, against the husband, that the husband had had such opportunity, but had not availed himself of it. The husband has come here in second appeal and the memorandum of appeal contains seven pleas: (1) That the law of "laan" has no place in Anglo-Mahomedan law and must be considered obsolete. (2) That "laan" does no more than give the wife the option of applying to the Court to put the husband upon the alternative of either retracting the accusation or stating on oath his wife's treachery, and no suit for dissolution of marriage is maintainable without the above formality being strictly complied with. (3) That the husband has not only not made the accusation of his wife's infidelity on oath, but has sworn his wife to be faithful to him and sued his wife for restitution of conjugal rights. (4) That assuming that the husband charged his wife with infidelity, the statement of the husband on oath coupled with the statements in the duly verified plaint and his whole course of conduct, amounted to retraction of the accusation. (5) That no suit for dissolution of marriage was maintainable. (6) That the appellant was prejudiced by no proper opportunity being given to him for the production of his evidence. And lastly that the appellant is entitled to a decree for restitution of conjugal rights. I propose to deal first with the 6th plea. Both the Courts below show that abundant opportunity was given to the appellant for examination of his witnesses. It was his own fault that he did not take the necessary steps in payment of process fees and fees for interrogatories, etc. That plea entirely fails.

I now come to the question raised by the plea relating to laan. Muhammad Yusuf Khan Bahadur, in his Mahomedan Law, Vol. II, Edn. 1898, P. 352, et seq.

gives a full account of "laan" and the accuracy of the account there given has not been seriously questioned. Briefly put it is that when a Mahomedan makes an allegation of misconduct against his wife and the wife denies the same, both parties can go to the Kazi. The husband, in the presence of the Kazi, four times over repeats his allegation of misconduct before the Kazi, strengthens it by an oath, that oath being accompanied by the use of the word "laan" or curse of God. The wife gives testimony also four times over and accompanies her testimony by the use of the word "ghazab." If either of the persons refuse to make laan the Kazi is to imprison that person who refuses until he or she makes the laan. If both husband and wife have made their respective oaths, etc., the Kazi can effect separation between them. The Kazi in the present day is replaced by the Court and, as noted above, the Court has found against the husband and has pronounced a separation between husband and wife. No authority has been cited, nor do I know of any which has pronounced that the doctrine of "laan" has no further place in Anglo-Mahomedan law or that it should be considered obsolete. Mr. Mohammad Yusuf, Khan Bahadur, mentions it as still prevalent. Sir R. K. Wilson in his *Anglo-Mahomedan Law*, 4th Edn, 1912, para. 76, says:

"The fact of a husband having (whether truly or falsely) charged his wife with adultery, will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings",

and in the next chapter deals with it as still part of the Anglo-Mahomedan law. The first plea is therefore decided against the appellant. Baillie in his *Mahomedan Law* after describing the form of "laan" goes on to say at p. 338: "When both parties have taken the laan the Judge is to separate them." The second plea that no suit for dissolution is maintainable until the husband has been given the option of retraction of the accusation of his wife's adultery has not been supported. This disposes of the remaining pleas in appeal. I agree with the lower appellate Court and would dismiss the appeal.

Banerji, J.—I also am of opinion that this appeal should be dismissed and the

decree of the Court below affirmed. The main question in the case is whether a Mahomedan wife is entitled to bring a suit for divorce and obtain a decree for dissolution of marriage on the ground that her husband has falsely charged her with adultery. The defendant denies having made such a charge, but both the Courts below have found that he made it and imputed to the wife incest with her own brother and that the imputation was wholly without foundation. We have therefore to consider whether in these circumstances the plaintiff is entitled under the Mahomedan law, which must govern questions of marriage and divorce, to have it declared that her marriage with the defendant has been dissolved. The authorities of Mahomedan law on the subject have been laid before us and, in my opinion, they clearly establish that she is entitled to such a declaration. The law on the subject is thus stated in Shama Charan Sircar's *Mahomedan Law*, Tagore Law Lectures for 1873, at p. 406:

"If a husband charges his wife with adultery . . . the charge is investigated by the Kazi, who, upon proof thereof, issues a decree of separation between the husband and the wife and thus their marriage is dissolved. The separation so effected is an irreversible divorce."

Mr. Ameer Ali lays down the rule in the following terms in Vol. 2 of his well-known work on *Mahomedan Law*, p. 575, Edn. 3 :

"When a false accusation (of adultery) is preferred against a woman, and the husband is unable to establish the charge, the woman is entitled to obtain a divorce from the Court."

The same view is propounded in Sir Rowland Wilson's *Anglo Mahomedan Law* and in the Tagore law Lectures by Khan Bahadur Muhammad Yusuf cited by my learned colleague. It is contended on behalf of the appellant that the proceedings known as laan in Mahomedan law should have been gone through and this not having been done in this case, the marriage between the parties has not been dissolved and the marriage tie has not been served. Having regard to the authorities on the subject this contention is untenable. The proceeding known as laan or imprecation is only a procedure which either the wife or the husband could adopt before a Kazi or Judge. The reason for it is stated by Mr. Ameer Ali in the following terms :

"Under the Mussalman law, a charge of adultery preferred by a husband against his wife can only be established by the direct testimony of four witnesses to the fact. From the nature

of the offence however the cases in which ocular and direct evidence is available are extremely rare. In order to obviate the evils which would necessarily result from a denial of all redress to the injured husband, in those numerous instances where he is morally convinced of the guilt of his wife, but has no direct testimony to establish it, or when he alone is cognizant of the fact, the law has prescribed the proceeding by *laan*. "

The Mahomedan law of evidence being no longer in force and the ordinary Courts having taken the place of Kazis, these Courts are the authorities which should make a decree for divorce on being satisfied according to the ordinary rules of evidence that a false imputation was made by the husband and it is unnecessary to comply with the formalities of *laan*. This is also the opinion of Mr. Ameer Ali and Sir Rowland Wilson, and this seems to be the legitimate inference to be drawn from the rules of Mahomedan law on the subject.

The only reported case to which our attention has been drawn is that of *Jaun Beebee v. Sheikh Moonshee Beparee* (1) in which the learned Judges observed that "a charge of adultery does not operate as a divorce." No authority is cited in support of this view, nor was it decided that a decree for divorce could not be passed by the Court under the circumstances alleged. If the learned Judges intended to hold that a Mahomedan wife cannot sue for divorce, or a Court cannot grant a decree declaring her marriage dissolved, on the ground that her husband had charged her with infidelity, I am unable with great respect to agree with them, the authorities of Mahomedan law being clear on the point. I agree with the Courts below that there was no retraction of the charge and I am of opinion that the decree appealed against is correct.

By the Court.—The appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1865] 3 W. R. 93.

A. I. R. 1919 Allahabad 184

WALSH, J.

Har Narain—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 101 of 1919, Decided on 12th April 1919, against order of First Addl. Sess. Judge, Aligarh, D/- 9th February 1919.

Penal Code (1860), S. 430—Accused interfering with banks of canal—No proof by

evidence of respectable persons that act caused or must have been known likely to cause diminution of supply of water—Accused is not guilty under S. 430 but under Northern India Canals and Drainage Act (1873), S. 70.

Where a person interfered with the banks of a canal and the prosecution could not prove by the evidence of respectable persons that the act had caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes:

Held: that a conviction under S. 430, I. P. C., was improper and that a conviction under S. 70, Northern India Canals and Drainage Act, was more appropriate. [P 184 C 2]

M. L. Agarwala—for Applicant.

R. Malcomson—for the Crown.

Judgment.—In this case I propose to follow the example of my brother Knox, J., in the case cited to me, viz., *Tajuddin v. Emperor* (1), and to convert the conviction into one under S. 70, Canals Act. No. 8 of 1873 instead of a conviction under S. 330, I. P. C. I will just say a word or two for the guidance of the lower Courts in this matter, which appears to me to be occurring rather frequently just now, possibly because of the shortage of water due to the failure of the rains. This is the converse case to the one which was referred to my brother Piggott and myself a few days ago. If the act is one which has in fact caused or but for prompt intervention would have caused diminution in the ordinary supply of water for agricultural purposes it is an act of mischief within the meaning of S. 430, I. P. C., which has very much more serious consequences than merely interfering with the banks of a canal, and may be punished with greater severity; and if having regard to the serious nature of the consequences and to the necessity of severer measures the prosecuting authorities think it right to formulate a charge under S. 430, they must call some evidence to prove that within the meaning of the section, the act has caused or must have been known to be likely to cause a diminution of the supply of water for agricultural purposes. That fact ought to be supported by the evidence of some reputable person who knows the facts. On the other hand if that fact cannot be proved and it is not desired to establish the more serious aspect of the offence, then it is sufficient to prosecute under the section of the Canal Act which I have mentioned with a view to a lighter punishment.

(1) [1908] 5 A. L. J. 159.

Owing to the fact that there is in this case an absence of evidence directed to S. 430, I have adopted the course of altering the conviction. Following the example of my brother Knox, I think the sentence of one month appropriate to the circumstances of this case. As the applicant has already served substantially that period and is now on bail, I direct that his sentence be reduced to the amount already served and that his bail be discharged. It is however to be understood that if these offences increase in frequency, heavier sentences by way of deterrence will have to be administered.

V.B./R.K. *Conviction altered.*

A. I. R. 1919 Allahabad 185 (1)

STUART AND WALLACH, JJ.

C. Wilson—Plaintiff—Petitioner.

v.

Jagmandir Das Baldeo Singh & Co.—
Defendants—Opposite Party.

Civil Revn. No. 173 of 1918, Decided on 6th August 1919, against order of Sub-Judge, Mussoorie, D/- 17th August 1918.

Civil P. C. (5 of 1908), Ss. 151 and 152—
Award granting arbitrators' fee—Omission in decree to fix fee—Decree can be amended.

Where an arbitration award provides for the payment by the plaintiff of the costs including the arbitrators' fee, but the Court omits to fix the fee before the decree is prepared, it is open to the Court to fix the fee after preparation of the decree. [P 185 C 1]

L. M. Banerji—for Petitioner.

Nihal Chand—for Opposite Party.

Judgment.—The arbitration award provided that the applicant Wilson should pay the costs. The costs included the arbitrators' fees. A decree was prepared under the terms of the award. After the decree was passed according to the findings of the learned Subordinate Judge, it was discovered that the fees of the arbitrators had not been fixed. The learned Judge fixed the fees. We see no reason not to accept the conclusions that the fees had not been fixed, and that he had a right to fix the fees. We do not consider he fixed the fees too high. Thus the case stands that, if he had fixed the fees before the decree his action would have been correct and could not have been challenged, is the case altered in any way because he fixed the fees after the decree had been passed? We cannot see that there was anything to prevent him from doing this and there is nothing upon which we can interfere in revision. We therefore dis-

miss this application with costs including fees on the higher scale.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 185 (2)

PIGGOTT AND WALSH, JJ.

Laik Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 808 of 1918, Decided on 8th November 1918, from an order of Sess. Judge, Farrukhabad.

Penal Code (1860), Ss. 299, 304 and 326—
Incised wound resulting in death—Injury not inflicted with such intention or knowledge as to bring case within definition of culpable homicide—Accused held guilty under S. 326.

A dispute having arisen between one L and one B, the latter attacked the former with a stick. L seeing that G was advancing to the help of B ran into his house and came out with a chopper in his hand with which he inflicted an incised wound on B's shoulder and one or two minor injuries. B subsequently died of septicaemia caused by the wound in his shoulder:

Held: that the injury to which B subsequently succumbed not having been inflicted with such intention or knowledge as to bring the case within the definition of culpable homicide, L could be convicted only of an offence under S. 326.

[P 186 C 2, P 187 C 1]

Satya Chandra Mukerji—for Appellant.

R. Malcomson—for the Crown.

Judgment.—Laik Singh has been found guilty of the murder of his own half-brother, Bhagwan Singh, under the following circumstances: There had been bad blood between the parties previously, because Bhagwan Singh and his own brother Gobardhan Singh had inherited property to which Laik Singh had no claim. On the day mentioned in the charge a trumpery dispute broke out between Laik Singh and Bhagwan Singh about a manure heap standing in a field just outside the village site. There was an interchange of abuse and then the two came to blows. The witnesses are not altogether clear in their statements as to the nature of this scuffle; but it seems fairly certain that Bhagwan Singh had some sort of stick or cane in his hand, whereas Laik Singh was empty handed to start with. Moreover Gobardhan Singh, brother of Bhagwan Singh, who is the principal witness for the prosecution, admits that he himself was coming up to help his brother so that the accused had reasonable ground for supposing that he might almost immediately be called upon to defend himself against an attack by two other men.

According to the evidence this scuffle was going on ten paces from the accused's house. The latter broke loose, ran into his house and came out, apparently at once, with a chopper in his hand. With this he attacked Bhagwan Singh, inflicting more than one injury; but he allowed himself to be disarmed by Gobardhan Singh, though the latter seems to have received three slight cuts in the process. Bhagwan Singh reached the hospital at 6 p. m. that evening, 29th June. The Sub-Assistant Surgeon says that he then found upon Bhagwan Singh's person one incised wound on the left shoulder about an inch deep, a slight cut on the left thumb and three contused wounds on the head.

None of them were more than skin deep and one at least of them apparently caused by a fall. All the injuries seemed to him to be simple, but he desired to keep Bhagwan Singh in the hospital while he treated him for the wound in the shoulder. On the morning of 1st July, Bhagwan Singh left the hospital, without consulting the medical officer or informing him of his intention, but he came back on the evening of 2nd July. By that time the wound in the shoulder, not having been properly dressed for two days, had deteriorated in condition. The injured man remained in the hospital until the night of 7th to 8th July 1918, when he again went away of his own accord. The Sub-Assistant Surgeon does not seem to have thought his condition serious, although he found that the man was suffering from fever by which he presumably means that he had a temperature above the normal. As a matter of fact Bhagwan Singh died on 11th July. The Civil Surgeon, when conducting the post mortem examination, found only two wounds. The contused wound referred to in his evidence, of which he does not give the location, was presumably one or other of the slight injuries to the head which the Sub-Assistant Surgeon had observed on 29th June. The other injury was the incised wound on the left shoulder. The Civil Surgeon found that it penetrated through the head of the left humerus into the shoulder joint.

The actual cause of death was apparently septic pneumonia, but the Civil Surgeon is of opinion that this had resulted from the injury to the shoulder. The question is, on these facts what is the

offence of which Laik Singh ought to be convicted. It is open to argument whether he should be held to have caused the death of Bhagwan Singh within the meaning of Expl. 2, S. 299, I. P. C. There must obviously be a limit somewhere; and a man who in the course of a trifling scuffle was found to have inflicted a slight cut or abrasion on the finger of another man which being neglected by the latter became infected in some manner so as to induce tetanus as a result of such infection could scarcely be held to have caused the death of the other. The present case seems very much on the border line and a good deal might depend on the reasons which the Civil Surgeon might have given under a stringent cross-examination for his opinion that the septic pneumonia was directly connected with the wound in the shoulder and also in any opinion which he might have expressed under cross-examination as to the degree of danger to life which he would ordinarily expect to result from such an injury as that from which Bhagwan Singh was suffering. As a matter of fact the statement of the Civil Surgeon was very briefly recorded and does not give us very much help, although there seems no doubt that in his opinion the wound in the shoulder was, as he puts it, "the probable cause of death through septic pneumonia." Under the Indian Penal Code however the question of culpable homicide is made to turn mainly on the intention or knowledge of the accused. In the present case we think it may fairly be inferred that there was no intention of causing death, or even of causing such bodily injury as was likely to cause death. When he came out of his house with the chopper in his hand the accused was in a position to have inflicted upon Bhagwan Singh any injury which he seriously and resolutely intended to inflict.

On the evidence it would seem that he only struck at him in a half hearted manner, and he certainly allowed himself to be disarmed after a short scuffle. This is not one of those cases in which the nature of the injury inflicted enables the Court to infer with certainty that the person who struck the blow resulting in such injury must have intended at the moment to cause death, or injury of a most serious nature. It seems to us fairly open to the Court on this evidence to conclude that the injury to which Bhagwan

Singh eventually succumbed was not inflicted with such intention or knowledge as to bring the case within the definition of culpable homicide. We may add that we should in any event have been disposed to convict the accused of culpable homicide not amounting to murder, both on the ground of the provocation he had received and on the ground that he had acted at the outset in the exercise of a right of private defence, although he had very greatly exceeded such right. On the whole however the conclusion we come to is that the conviction of Laik Singh should be recorded under S. 326, I. P. C. He caused grievous hurt by inflicting an injury which endangered life and may fairly be presumed to have intended to cause at least grievous hurt when he attacked Bhagwan Singh with such a weapon as this chopper. He therefore caused grievous hurt with an instrument for cutting, and also with an instrument which used as a weapon of offence might easily cause death. The case falls under S. 326, I. P. C. We set aside the conviction and sentence in this case, and altering the conviction as above stated to one under S. 326, I. P. C. we sentence Laik Singh to undergo rigorous imprisonment for six years from the date of his conviction in the Court of Session.

V.B./R.K.

*Conviction altered.***A. I. R. 1919 Allahabad 187**

BANERJI AND WALLACH, JJ.

Mt. Imam Bandi—Plaintiff — Appellant.

v.

Puran Prasad and another — Defendants—Respondents.

Second Appeal No. 891 of 1917, Decided on 16th July 1919, against decree of Dist. Judge, Moradabad, D/- 3rd April 1917.

Limitation Act (9 of 1908), Art. 120—Property mortgaged by others—Plaintiff recovering property by suit—Mortgagee not made party — Mortgagee obtaining mortgage decree against mortgagors—Plaintiff though made party suit dismissed against him—On execution of mortgage decree plaintiff sued for declaration—Art. 120 held applied and cause of action arose not on date of mortgage but when property was brought to sale.

M and *A* mortgaged the suit property to *P*. *B* brought a suit against *M* and *A* to recover possession of the property mortgaged and to this suit *P* was not made a party. *B* obtained a decree. *P* then brought a suit on the basis of his mortgage against *M* and *A* in which *B* was joined as a party, but the suit against *B* was

dismissed. *P* applied in execution for the sale of the mortgaged property, but *B* claimed it as her own and brought the present suit for a declaration that the property was hers and was not liable to sale in execution of *P*'s decree. The suit was dismissed as barred by limitation, the trial Court holding that the cause of action accrued to the plaintiff on the date the mortgage was made, i. e., on 20th September 1907. On appeal to the High Court:

Held: that the fact of the mortgage having been made did not affect the plaintiff so long as no effort was made to sell the property in enforcement of the mortgage, and that the cause of action accrued to the plaintiff on the date on which the defendant attempted to sell the property, and that as the suit was instituted within six years of that date, it was not time barred.

[P 187 C 2; P 188 C 1]

S. A. Haidar—for Appellant.*S. Raza Ali*—for Respondents.

Judgment.—The judgment of the Court below cannot, in our opinion, be supported. The learned Judge has dismissed the suit on the ground that it is barred by limitation. The facts of the case are set forth in his judgment. It appears that Mahomedi Begum and one Agha Meer mortgaged the property in suit on 20th September 1907 to the respondents. After this mortgage the plaintiff brought a suit on 14th December 1907 against the respondents' mortgagors to recover possession of the property mortgaged. She obtained a decree from the Court of first instance and that decree was affirmed by the High Court. To that suit the present respondents were not parties, and therefore the decree in that suit is not binding on them. They brought a suit on the basis of their mortgage and obtained a decree against the mortgagors on 5th August 1912. They made the present plaintiff a party to that suit, but the suit was dismissed against her with costs. However in execution of that decree they have applied for sale of the mortgaged property which the plaintiff claims to be her own property. The plaintiff has brought this suit for a declaration that the property is hers and is not liable to sale in execution of the defendants' decree. The learned Judge holds that the plaintiff's cause of action arose on 20th September 1907 when the mortgage in favour of the defendants-respondents was made. This view is clearly erroneous. The fact of a mortgage having been made did not affect her so long as no effort was made to sell the property in enforcement of the mortgage. This has now been done

and the plaintiff's cause of action accrued on the date on which attempt was made by the defendants to sell the property. The suit is admittedly within six years from that date and therefore is not time barred. We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and to dispose of it on the merits. The appellant will have her costs of this appeal, including fees on the higher scale. Other costs will abide the event.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 188 (1)**

RAFIQUE, J.

Emperor

v.

Kifayat and others—Accused.

Criminal Ref. No. 835 of 1918, Decided on 20th December 1918, made by Sess. Judge, Meerut, D/- 9th November 1918.

Public Gambling Act (1867), Ss. 4 and 8—Conviction for keeping gaming house—Money seized in house can be confiscated.

On a conviction of any person for keeping or using any gaming house or being present therein for the purpose of gaming, the convicting Magistrate is authorized under S. 8 to order the forfeiture of any money seized at the house

[P 188 C 2]

The facts of the case appear from the referring order of the Sessions Judge and the explanation of the Magistrate, 1st Class, respectively.

Referring Order.—This is an application for revision of an order of Babu Jai Narain, Special Magistrate, convicting the applicant under S. 4, Gambling Act (3 of 1867) and sentencing him to pay a fine of Rs. 10.

Two points have been argued in this application. The first is that it is not proved that the house was used as a common gaming house, and the second that the learned Magistrate was not justified in ordering the confiscation of the money found on the premises. With regard to the first point it is sufficient to say that the police acted under a proper warrant in searching the house and that instruments for gaming were found in the room. The owner of the house, who has also been convicted but has not applied for revision of the order, was met coming out of the room as the police entered it. Under S. 6 of the Act therefore the presumption is that the house

was used as a common gaming house. The evidence produced to rebut this presumption is quite unsatisfactory. With regard to the other point, the ruling in *Maturwa v. Emperor* (1), recorded at p. 428 of 16 All. Law Journal Reports makes it clear that the order directing the confiscation of the money in the house was quite illegal. I have therefore to report the case for the orders of the Hon'ble High Court with the recommendation that this part of the Magistrate's order be set aside. The Magistrate will be asked to furnish any explanation he may think fit.

Explanation.—In this case Gabdu (owner of the gambling house) was convicted and sentenced to one month's rigorous imprisonment under S. 3/15, Gambling Act 3 of 1867. Kifayat and three other accused were convicted under S. 4 of the said Act and sentenced to pay a fine of Rs. 10 each. Out of the above five accused, Kifayat alone filed a revision in the Sessions Court.

In the order of the learned Sessions Judge, dated 9th November 1918, the ruling in *Maturwa v. Emperor* (1) (16 Allahabad Law Journal Reports, 428) was also referred to, but it is clear that it is concerned exclusively with S. 13 of the said Act and not with S. 3 or S. 4. This fact is mentioned in my judgment dated 24th September 1918, which I have marked with a red pencil. I may add here that under S. 8 of the said Act this Court was quite competent to order confiscation of money as well as gambling instruments found on the spot.

Judgment.—I have read the order of reference of the learned Sessions Judge of Meerut. It appears to me that in view of the provisions of S. 8, Act 3 of 1867, the order about the forfeiture of the money seized at the house is correct: vide *Emperor v. Tota* (2). Let the record be returned to the lower Court.

V.B./R.K.

Reference rejected.

(1) [1918] 40 All. 517=46 I. C. 156.

(2) [1904] 26 All. 270.

A. I. R. 1919 Allahabad 188 (2)

STUART, J.

Mohammad Husain and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 135 of 1919, Decided on 1st May 1919.

Penal Code (1860), S. 296—Mere spreading of false rumour does not amount to "causing disturbance."

The essential ingredient of an offence under S. 296 is the doing of an act which causes a disturbance. The mere spreading of false rumours, although they might result in most serious consequences, cannot be described as "causing a disturbance." [P 189 C 1]

S. M. Sulaiman—for Applicants.

R. Malcomson—for the Crown.

Judgment.—On 17th October 1918, during the Mohurram procession in Bareilly, a Julaha called Mindhai ran to a police station in the town with a report that a conch was being sounded in a Hindu temple adjoining the route of the procession in contravention of the Magistrate's orders. Mindhai with two other Julahas Mohammad Husain and Bhaggu then ran to the procession and shouted to the crowd that the Hindus were sounding conches and that the Tazias should be put down.

Thereupon the Tazias were put down and the procession was stopped. In the course of the criminal proceedings that followed, it was found that the report that conches were being sounded was absolutely untrue, that the Hindus were giving no provocation of any kind and that Mindhai, Mohammad Husain and Bhaggu spread false rumours which might have affected the Mahomedan crowd very seriously. Mindhai was convicted under S. 182 for making a false report to the police. All three men were convicted under S. 296, I. P. C., for voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies. Mohammad Husain and Bhaggu have come up in revision. Mindhai has made no application. No offence has been made out under S. 296. It cannot possibly be said that any of these men voluntarily caused disturbance to the procession. They caused no disturbance to the procession; they spread false rumours which caused the procession to come to an end. Fortunately the Mahomedans composing the procession were not incited to any act of violence against the Hindus. The actions of the applicants, although they might have had the most serious consequences, cannot be described as "causing a disturbance" to the procession and their convictions under S. 296 must be set aside. It would appear that a prosecution may have lain on these facts under

the provisions of S. 505 (c), I. P. C., for having circulated a false report which was likely to incite a class or community of persons to commit an offence against any other class or community. No such prosecution can however lie under the provisions of S. 196, Criminal P. C., unless upon a complaint made by order or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf, and in the absence of such authority I have no jurisdiction to frame a charge under this section.

The result is that the convictions being set aside, the bail bonds will be cancelled.

V.B./R.K. *Convictions set aside.*

A. I. R. 1919 Allahabad 189

RICHARDS, C. J. AND BANERJI, J.

Mt. Jai Kali—Applicant.

v.

Baldeo Singh and others — Opposite Parties.

Criminal Revn. No. 144 of 1918, Decided on 7th March 1919, from order of Sub-Judge, Mirzapur, D/- 27th July 1916.

(a) **Hindu Law—Widow—Suit for specific performance of personal contract made with husband—Widow represents husband.**

The wife of a deceased Hindu, in the absence of male heirs, represents him in a suit for specific performance of a personal contract made with him. [P 190 C 1]

In a suit to enforce a contract to sell certain immovable property by specific performance, the sole plaintiff died leaving a widow, who applied to be brought on to the record as her husband's legal representative. The trial Court rejected the application on the ground that the deceased was a member of a joint Hindu family and his widow could not continue the suit:

Held: that the plaintiff's widow was his legal representative in respect of his rights under a personal contract and that the order rejecting her application was therefore illegal and must be set aside. [P 190 C 1]

(b) **Civil P. C. (1908), O. 22, R. 3—Court rejecting application by Hindu widow to be brought on record as representative of deceased husband refuses to exercise jurisdiction which it has—Civil P. C. (1908), S. 115.**

Where a Court rejects an application by a Hindu widow to be brought on to the record as the representative of her deceased husband, it refuses to exercise a jurisdiction which it has and the High Court will interfere on the revision side. [P 190 C 1, 2]

Kailas Nath Katju—for Applicant.

Surendra Nath Sen, Gokul Prasad and Jhang Bahadur Lal—for Opposite Parties.

Judgment. — This application arises under the following circumstances: A suit was brought by one Audhesh Chunder to enforce, by specific performance, an alleged contract to sell certain immovable property. Whilst the suit was pending the sole plaintiff died. His widow then applied to be brought on the record in his place. Her application was opposed by some one or more of the defendants who alleged that her deceased husband was a member of a joint Hindu family and that therefore his wife had no right to continue the suit. This contention met with the approval of the Court below, which rejected the application of Mt. Jai Kali to be brought on to the record in the place of her deceased husband, and (we are informed) on a subsequent date declared that the suit had abated. We think the order rejecting the application of Mt. Jai Kali was incorrect. It would, of course, follow that any subsequent order declaring that the suit had abated was also incorrect. The suit by Audhesh Chunder was a suit upon an alleged contract to sell to him certain immovable property. This was a contract personal to himself and even if he happened to be a member of a joint Hindu family, his wife is the person who would represent him in the suit to enforce the alleged contract.

The agreement put forward by the other side is that a question arose as to who was the "legal representative" of the deceased plaintiff, and that according to the provisions of O. 22, R. 5, this question is to be determined by the Court in which the suit is pending. In our opinion, on the admitted facts of the present case, no question arose as to whether any person other than his widow represented the deceased plaintiff. It is quite clear that the surviving members of a joint Hindu family could not, in a case like the present, represent the deceased plaintiff. It is no doubt true that where one member of a joint Hindu family dies, all his rights cease and the property from thenceforward is held by the surviving members; but this proposition of law is in no way inconsistent with the other proposition which we here lay down, namely, that a deceased Hindu's wife (in the absence of male heirs) represents him in a suit for specific performance of a personal contract made with him. The Court therefore refused to exercise a

jurisdiction which it had, namely, to bring the applicant on to the record. We allow the application, set aside both orders of the Court below and direct that Court to bring the name of the applicant on to the record in the place of her deceased husband and then to proceed to hear and determine the suit according to law.

The applicant will have his costs in this Court including fees on the higher scale. Other costs will follow the result.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 190

PIGGOTT AND WALSH, JJ.

Baljit and others—Plaintiffs—Appellants.

v.

Mahipat and others—Defendants—Respondents.

Second Appeal No. 139 of 1916, Decided on 11th November 1918, from decree of Offg. Dist. Judge, Farrukhabad.

Agra Tenancy Act (1901), S. 167—Suit for ejectment in Revenue Court dismissed—Subsequent suit in civil Court is barred.

Plaintiffs brought a suit for ejectment against the defendants in the Revenue Court on the ground that the latter were their sub-tenants. The defendants alleged that they were joint tenants of the holding along with the plaintiffs. The Revenue Courts upheld the plea of the defendants and dismissed the suit. Plaintiffs then brought a suit in the civil Court to eject the defendants as trespassers.

Held : that the suit was barred by the provisions of S. 167. [P 191 C 2]

Surendra Nath Sen—for Appellants.

N. C. Vaish—for Respondents.

Piggott, J.—In this suit the plaintiffs sought the ejectment of the defendants from certain land on the allegation that it formed part of an occupancy holding of which the plaintiffs are the tenants, while the defendants are in possession as trespassers. The case set up was that the defendants had originally entered into possession as subtenants, but that, when the plaintiffs took proceedings to eject them as such by a suit brought under the Tenancy Act in a Revenue Court, the defendants denied the plaintiffs' title and set up a false claim to be in possession as joint tenants of the holding. It was admitted that this plea had prevailed in the Revenue Court, which dismissed the suit for ejectment: as a matter of fact it found in favour of the plea of joint tenancy set up by the defendants. The plaintiffs in the present suit adhered to their claim

that the defendants were originally their subtenants in respect of the land in suit; they claimed that the nature of the defendants' possession had changed and had become that of trespassers, either from the date on which they denied the title of the plaintiffs in their pleading before the Revenue Court, or from the date of the Revenue Court's decision.

Now it seems sufficiently obvious that if the defendants were originally subtenants of this land, they did not become trespassers on the date on which they denied the fact in their Revenue Court pleadings. To hold otherwise would involve this consequence: that a tenant against whom a suit for ejectment was filed in a Revenue Court could oust the jurisdiction of that Court by denying the plaintiff's title. This suggestion is opposed to the entire spirit of the Tenancy Act and to the express provisions of S. 56 and S. 199 of the same Act. Therefore it has been laid down in a number of cases that an agricultural tenancy subject to the provisions of the United Provinces Tenancy Act (Local Act 2 of 1901) is not terminated merely by the lessee's denial of the lessor's title. This was the ratio decidendi in the case of *Narain Singh v. Gobind Ram* (1), a case precisely on all fours with the present. I have repeatedly affirmed the same principle myself, as for instance in *Bechu Sahu v. Nand Ram* (2), and *Ali Jafar v. Phulmanta Koer* (3). The plaintiffs are therefore reduced to contend—and para. 6 of their plaint shows that this was the position on which they intended to rely—that a change in the status of the defendants was effected on 14th July 1914, when the Revenue Court (erroneously) decided that the defendants were not subtenants of the land in suit. This raises the further question, whether the plaintiffs are entitled to succeed upon the plea that the Revenue Court erroneously decided a question which it was the sole Court competent by law to determine. It was not merely a matter in respect of which a suit under the Tenancy Act "might be" brought within the meaning of the concluding words of S. 167 of the said Act; it was one in respect of which a suit had actually been brought and had been determined by the sole Court competent

to entertain the said suit. In my opinion the civil Court cannot reconsider this question without violating the provisions of S. 167, Tenancy Act. This was the view taken by a Bench of this Court in *Kishore Singh v. Bahadur Singh* (4), Second Appeal No. 1286 of 1916, decided on 2nd, July 1918, in which judgment all previous authorities are passed in review.

There is said to be authority to the contrary in the case of *Kanhi Ram v. Durga Prasad* (5). I think that case is distinguishable on the facts; but I feel more concerned to note that it was decided ex parte, and that the contention repelled by the learned Judges was that the decision of the Revenue Court operated as res judicata. There was no reference made to the provisions of S. 167, Tenancy Act.

I admit that the entire question of rival claims to a tenancy is not free from difficulty and perhaps requires reconsideration by the legislature. The provisions of S. 199, Tenancy Act, cover all cases in which a plaintiff claiming to be the proprietor of land brings a suit in a Revenue Court against a person whom he describes as his tenant, and is met by a plea of adverse proprietary title. The issue thus raised must either be referred at once to the civil Courts: or else it will be tried by the Revenue Courts subject to such provisions as to procedure and right of appeal as will make the decision operate as res judicata in any subsequent litigation between the same parties. The fact that a state of things precisely analogous may arise where a plaintiff alleging himself to be the tenant in chief of a holding brings a suit in the Revenue Court against a defendant whom he calls his subtenant, and is met by a plea of adverse title to the holding, does not seem to have been expressly considered by the framers of the Tenancy Act. My own opinion is that they took it for granted that the proprietor of the holding would always be made a party to such a suit, either at the instance of one or other of the claimants, or by the Court of its own motion. He is always a party interested in the result, and he may be vitally interested.

(1) [1911] 33 All. 523=9 I. C. 1022.

(2) A. I. R. 1914 All. 389=24 I. C. 700.

(3) A. I. R. 1915 All. 328=30 I. C. 546.

(4) [1918] 48 I. C. 470.

(5) A. I. R. 1915 All. 49=27 I. C. 913=37 All. 223.

Nor can any decision in a suit to which he was not a party finally conclude the question. Whether the dispute between the rival claimants to a tenancy be fought out in a Revenue Court or in a civil Court, the decision will not bind the proprietor if he was not a party to it. Obviously he cannot have a tenant whom he objects to, or whose title he denies, foisted upon him as the result of a litigation to which he was no party. There is the possibility of such litigation having been collusive; and in any case it is quite conceivable that there may be rival claimants to the holding of a deceased occupancy tenant, while the proprietor contends that there is no heir entitled to succeed and that the occupancy rights have escheated. If the Revenue Courts would always make the proprietor a party to such a litigation as has been above suggested, it would become patent that the dispute as between the proprietor and the rival claimants to the tenancy is one which is absolutely reserved by S. 167, Tenancy Act, to the jurisdiction of the Revenue Courts. In a case like the present, the suit as brought was one, on the face of it, maintainable in the civil Court; but when that Court had all the pleadings and the evidence before it, it could not without contravening S. 167, Tenancy Act, go behind the decision of the Revenue Courts that the defendants had not entered on the land in suit as subtenants of the plaintiffs. It follows that the decision of the lower appellate Court was correct. The defendants have held the land in suit adversely to the plaintiffs for over forty years. The plaintiffs can only get over this fact by asserting that the defendants were their subtenants up to the date of their filing a certain written statement in the Revenue Court, or up to the decision of that Court in the ejectment suit. It is not a sound proposition of law that the defendants, if originally subtenants, became trespassers on either of these dates; and the plea of subtenancy has been heard and finally determined by the only Court capable of entertaining it. I would dismiss this appeal with costs.

Walsh, J.—I agree.

By the Court.—The appeal is dismissed with costs.

V.B./R.K.

Appeal dismissed.

*** A. I. R. 1919 Allahabad 192**

KNOX, AG. C. J. AND BANERJI, J.
Parbhu Dayal—Plaintiff—Appellant.
v.

Anandi Din and another—Defendants—Respondents.

Letters Patent Appeal No. 147 of 1917, Decided on 22nd May 1919, against order of Rafique, J., D/- 18th May 1917 in S. A. No. 93 of 1916.

* Civil P. C. (1908), S. 47—Sale in execution—Objection allowed—Remedy of decree-holder is by way of appeal and second appeal—S. 47 forbids regular suit.

Where an objection to a sale in execution of a decree is allowed, the decree-holder, if aggrieved thereby, has his remedy by way of appeal and second appeal, and if he omits to appeal the order of the executing Court is final and binding upon the parties. S. 47 forbids the institution of a regular suit to avoid the consequences of such an order. [P 193 C 1]

A. P. Dube—for Appellant.

Damoder Das—for Respondents.

Judgment.—The facts of the case out of which this appeal arises are fully set forth in the judgment of the learned Judge of this Court. The appeal however may be decided upon another ground which is not the ground upon which the suit was decided by the Courts below and by the learned Judge of this Court. It appears that one Anandi Din executed a simple mortgage in favour of the present plaintiff Prabhu Dayal. A decree upon that simple mortgage was obtained against him and the respondent Ajudhia Parshad, who had purchased the equity of redemption from Anandi Din before the suit was brought. Anandi Din had executed a usufructuary mortgage in favour of Prabhu Dayal in respect of some other property in 1899. In execution of the decree upon the simple mortgage obtained by Prabhu Dayal, the mortgaged property was sold and as the proceeds of the sale proved insufficient to discharge the amount of the decree, Prabhu Dayal applied for and obtained a decree under O. 34, R. 6, Civil P. C. To the proceedings relating to that decree he had made Ajudhia Parshad a party, but the Court refused to make a personal decree against him and exempted him from the suit. Subsequently Prabhu Dayal attached the equity of redemption of Anandi Din in respect of the usufructuary mortgage to which we have referred and some other property. This equity of redemption was also included in the sale deed executed by Anandi Din in favour of Ajudhia Parshad

Ajudhia Prasad filed an objection stating that the equity of redemption could not be sold as he had purchased it. The objection was allowed by the Court executing the decree and the prayer for the sale of the property was disallowed. Prabhu Dayal appealed from this order under S. 47, Civil P. C. The appellate Court held that no appeal lay and accordingly dismissed the appeal. Prabhu Dayal did not prefer a second appeal to this Court but he instituted the present suit on 16th January 1915. The order of the Court allowing the objection of Ajudhia Parshad was dated 12th February 1913 and one of the questions which was raised in the suit in the Court below was whether the suit was time barred. It was held that it was barred by the law of limitation.

In the view which we take of the case, we do not deem it necessary to consider the question of limitation. The proceedings for a decree under O. 34, R. 6, were proceedings in the suit brought by Prabhu Dayal to enforce the simple mortgage executed by Anandi Din. As stated above, the suit at that stage was dismissed against Ajudhia Parshad and he was exempted. Under explanation to S. 47, Civil P. C., a defendant against whom a suit has been dismissed is for the purposes of that section a party to the suit, and any question relating to execution, satisfaction or discharge of the decree as between him and the decree-holder is a question between the parties to the suit. Although Ajudhia Parshad had been a party to the suit and had been exempted from the personal decree passed in the suit, he still continued to be a party to the suit within the meaning of S. 47 and his objection to the sale of the property, which the decree-holder Prabhu Dayal sought to sell, was an objection relating to the execution, satisfaction or discharge of the decree. It is true that under the old Civil Procedure Code it had been held by this Court that a defendant against whom the suit had been dismissed had ceased to be a party to the suit and that a question relating to execution as between the decree holder and him was not a question between the parties to the suit. There was a conflict of opinion on the point between the different High Courts and it is manifest that in order to put an end to this conflict the Explanation to S. 47 was inser-

ted in the present Civil Procedure Code. In view of the provisions of the section as it stands, Ajudhia Parsahd was a party to the suit for the purposes of S. 47 and the questions which arose between him and the decree-holder Prabhu Dayal were questions relating to the execution, discharge or satisfaction of the decree. Those questions could only be determined by the Court executing the decree and not by separate suit. Ajudhia Parshad rightly preferred his objections under the section and those objections having been allowed, the decree-holder's remedy was to appeal. He did appeal but unfortunately the appellate Court took an erroneous view of the law. That however could not make any difference. He ought to have appealed to this Court and obtained a decision from this Court on the point. He did not do so but he instituted a suit which is forbidden by the provisions of S. 47. The learned counsel for the appellant has asked us to treat the present suit as an application for execution and has invoked in aid the provisions of sub-S. 2 of the section. The answer to this contention is that the matter having been already decided by the Court executing the decree and the decision of that Court having now become final and binding upon the parties, the same question cannot be raised in execution. In this view the suit was bound to fail and was rightly dismissed. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 193

RICHARDS, C. J. AND BANERJI, J.

Krishnapal Singh and others—Appellants.

v.

D. L. Ranjit Singh and others—Respondents.

Execution First Appeal No. 208 of 1918, Decided on 7th March 1919, against Decision of Judge of Small Cause Court, Allahabad.

Execution—Duty of Court—Decree is to be executed without any variation.

It is the duty of an executing Court to execute a decree as it stands without making any variation in its terms: [P 194 C 1]

Where a decree awarded a specific sum as mesne profits and became final:

Held: that the Court executing the decree could not allow any deductions from the amount awarded. [P 194 C 1]

*Baleshri Prasad—*for Appellants.

*Tej Bahadur Sapru—*for Respondents.

Judgment.—This appeal arises out of execution proceedings. The main question relates to mesne profits. In a suit for ejectment from a house the learned Subordinate Judge made the following decree:

"It is ordered that the plaintiff do get from the defendant Rs. 65, the rent for October 1905, and the moveables specified below, otherwise Rs. 250 the value thereof as well as mesne profits pendente lite and future up to the date of possession at Rs. 65 a month together with future interest at the rate of 8 annas per cent. per mensem."

This decree was set aside by this Court and the suit dismissed. On appeal to His Majesty in Council the decree of this Court was set aside and the decree of the trial Court restored with costs. The decree-holders are now seeking to execute the decree. The respondent Dr. Ranjit Singh claimed to deduct from the mesne profits of Rs. 65 a month certain payments which he alleges he had made in respect of repairs, taxes, ground rent and other matters and interest thereon. His contention found favour with the Court below and the sum of Rs. 9,957-1-7 was allowed to be deducted against the Rs. 65 per mensem. We think that the decision of the Court below was not correct. The Court had to execute as it stood the decree which had become the final decree in the suit, namely, the decree of the Subordinate Judge. The decree could not be varied in any way. It may well be that the whole or a considerable portion of the deductions allowed by the Court below might have been allowed if the Court was fixing what mesne profits should be allowed to the plaintiff. But the decree of the learned Subordinate Judge fixed the mesne profits at Rs. 65 per mensem and that decree has become final. Certain authorities have been cited to us including the cases of *Kachar Ala Chela v. Sha Oghadbhai Thakarshi* (1). A little consideration will show that all that these cases decided was that allowances for certain payments can be made in favour of the person in possession when the Court is ascertaining what mesne profits it should award in a suit for possession of immovable property. Mesne profits are defined by S. 2, Cl. (1) Civil P. C., and there can be no doubt that the Court is entitled to take certain matters into consideration when ascer-

taining what the mesne profits are to be. But in the present case this had already been done or must be assumed to have been done, when the learned Subordinate Judge awarded mesne profits at the rate of Rs. 65 per mensem. It appears also that the Court below in calculating costs allowed in the Court of first instance omitted to include interest on those costs, although awarded in the original decree. It seems also that the Court below itself intended to give interest on these costs because it is so stated in the judgment. The interest amounts to Rs. 836-8-6. The decree-holders are entitled to this sum also. With regard to interest on the costs in this Court and in the Privy Council no mention of interest is made in the decision of their Lordships of the Privy Council, and we see no reason to interfere with the view taken by the Court below with regard to this item. The claim for interest on the other amounts was disallowed by the Court below, and we see no reason to interfere. The result is that we modify the order of the Court below by allowing the two sums, namely, Rs. 9,957-1-7 and Rs. 836-8-6 in addition to the amount allowed by that Court. To this extent we allow the appeal. Costs here and in the Court below will be in proportion to failure and success. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

* A. I. R. 1919 Allahabad 194

RICHARDS, C. J. AND TUDBALL, J.

Dildar Husain and others—Defendants—Appellants.

v.

Sheo Narain and others—Plaintiffs—Respondents.

First Appeal No. 64 of 1918, Decided on 1st August 1918, from an order of Dist. Judge, Cawnpore.

* Civil P. C. (1908), O. 21, R. 57—"Decree-holder's default"—Meaning explained—Execution of decree—Application dismissed for default, but Court ordering that attachment shall continue—Attachment ceases in spite of Court's order.

In execution of a simple money decree a whole house was sold by mistake instead of a portion thereof. On the mistake being discovered the Court made the following order: "The sale is set aside. The application for execution is struck off. The attachment will remain." Subsequently the judgment-debtor sold his share in the house to the plaintiff.

(1) [1893] 17 Bom. 35.

Held: that on the sale being set aside the execution application was dismissed for the decree-holder's default in carrying on proceedings, so that O. 21, R. 57, applied to the case; and in spite of the Court's order that the attachment should continue it ceased to subsist, and that therefore the purchase by the plaintiff was not invalid.

[P 196 C 2]

Per *Richards, C. J.*—The expression "decree-holder's default" in R. 75, O. 21, Civil P. C. means a failure to do what the decree-holder [is bound to do, that is to go on with his application and have the property sold. [P 195 C 2 P 196 C 1]

Kailas Nath Katju—for Appellants.
N. C. Vaish—for Respondents.

Richards, C. J.—This appeal arises under the following circumstances: Certain property was attached in execution of a simple money decree as far back as the year 1914. Various objections were raised. The property, which consisted of a house, had been sold and purchased by an auction-purchaser. It turned out that the whole house should have not been sold. The auction-purchaser naturally complained that he had bid for a whole house and not a part of a house, and in the end an order was made by the Court executing the decree to the following effect: "The sale is set aside. The application for execution is struck off. The attachment will remain." Further applications were made for execution of the decree, but no application was made in respect of the property now in dispute which consists of a part of the house to which we have already referred. Eventually in the year 1916 a further application in execution was made and it was asked that (the saleable?) portion of the house should be sold. An objection was raised on behalf of the respondent Sheo Narain that he had purchased (that?) portion of the house in the year 1916. The decree-holder replied that the attachment was still subsisting and that therefore the judgment-debtor could convey no title to Sheo Narain as against the decree-holder. This contention met with the approval of the Court of first instance. In appeal the learned District Judge held that no attachment as against this property was subsisting in the year 1916 when the sale was made. He therefore remanded the case in order that the Court below might try whether or not the sale was a bona fide sale to Sheo Narain and other issues. The present appeal is against the order of remand, and it has been strenuously urged that the attachment still subsisted in 1916 by virtue of

the order that was made in the year 1914, to which we have already referred. I think the view taken by the lower appellate Court was correct. R. 57. O. 21, Civil P. C., is as follows:

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

In my opinion the order of the Court below amounted to a dismissal of the application for execution. It certainly was not an adjournment. It therefore seems to me to follow that if the application can be said to have been dismissed by reason of the "decree-holder's default," the attachment ceased upon the dismissal of the application. It is contended that there was no "default" on the part of the decree-holder. In the present case it seems to me that there clearly was a default. The decree-holder, owing to the confusion as to the property and the sale, was unable to proceed with that application and was determined to make a fresh application for execution in respect of this property if so advised, and which fresh application he eventually made. It was contended that the "default of the decree holder" means only those cases in which the decree-holder fails to put in an application or fails to deposit fees or some such matter, and in support of this contention the following cases have been quoted: *Karaturi Satyanarayana v. Gopisetti Narayanaswami* (1) and *Valiakath Puthiah v. Manakkal Parameswaran* (2). I see no reason why this restricted meaning should be given to the words in the rule. Previous to the passing of the present Code of Civil Procedure, there was considerable conflict as to the effect of "striking off;" or in other words, dismissing an application for execution. It was to put an end to this conflict that an alteration was made by the present Code. The exact point arose in the case of *Namuna Bibi v. Roshun Meah* (3), in which case I think it was rightly decided that the words in the rule were not restricted to default of appearance or matters of that description. It really means a failure to do what the decree-holder was bound to do that is to

(1) [1916] 38 I. C. 300.

(2) [1916] 35 I. C. 240.

(3) [1911] 38 Cal. 422 = 3 I. C. 558.

go on with his application and have the property sold. I am supported in this view I think by the provision in the rule itself that in a fitting case the application for execution can be adjourned, in which case of course the attachment could be maintained. I would dismiss the appeal.

Tudball, J.—I fully agree. I think a little more stress should be placed upon the actual facts of this case. The whole house was sold by mistake instead of only a share therein on 24th October 1914. The sale was set aside at the request of all the parties concerned. This decree had been originally passed in the Court of Small Causes at Lucknow, and it had been transferred for execution to the Court of the Munsif in Cawnpore. When the sale was set aside the Munsif called upon the decree-holder to proceed with his application. In reply to this on 10th December 1914 the decree-holder said:

"Let the execution case be dismissed but the attachment be maintained. I will put in another application afterwards so that there will be no legal difficulty."

The Court thereupon passed the order as asked by the decree-holder:

"the execution case is struck off, the attachment maintained and the costs will be borne by the judgment-debtor."

After this the Munsif returned the decree as unexecuted to the Lucknow Court. The decree-holder again applied to the Lucknow Court to transfer the decree for further execution. A fresh certificate was sent. On 21st January 1916 a fresh application for execution was made for the attachment of a sum of Rs. 250 belonging to the judgment-debtor in the hands of a pleader. The case was transferred to the Small Cause Court, the sum was realized and the application for execution was struck off on 8th March. On 14th March another fresh application for execution was made for attachment and sale of certain moveable property. The decree was further partially satisfied and that application for execution was struck off on 31st April 1916. Again the papers were returned to the Lucknow Court. Then the property now in dispute was sold by the judgment-debtor to the present respondent. The decree-holder then applied for fresh execution of his decree and he asked to have the share in this house sold. To my mind it is clear, and beyond all doubt, that the decree-holder in December 1914 did not wish to proceed further with his then

pending application for execution, and it was in fact dismissed by reason of this default in carrying on proceedings. To my mind O. 21, R. 57, clearly and distinctly applies to the present case. The fact that the Court in dismissing the application said the attachment should continue makes no difference. The law distinctly says that in these circumstances the attachment shall cease. The decision in *Aziz Bux v. Kaniz Fatima Bibi*(4), a decision to which I myself was a party, is placed before me in support of the present appeal. It clearly does not apply, nor is there any discussion in my judgment of the meaning of the word "default." What is said in that judgment cannot be divorced from the facts of that case.

In that case there had been a wrong order passed by the High Court dismissing an application for execution. That order was subsequently set aside on review, with the result that the application for execution was never dismissed at all. The ruling has no application to the circumstances of the present case.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

V.B./R.K.

Appeal dismissed.

(4) [1912] 34 All. 490=15 I. O. 49.

A. I. R. 1919 Allahabad 196

PIGGOTT AND WALSH, JJ.

Mahadeo Kori—Defendant—Appellant.

v.

Sheoraj Ram Teli—Plaintiff—Respondent.

First Appeal from Order No. 73 of 1918, Decided on 23rd October 1918, from order of Dist. Judge, Ghazipur, D/- 10th April 1918.

(a) Stamp Act (2 of 1899), Arts. 1 and 5—Acknowledgment—Memorandum of rate of interest payable in future inserted over signature of debtor for purpose of being used as evidence of agreement of interest falls under Art. 5.

A memorandum of the rate of interest to be payable in future, when appended to an acknowledgment of a debt, over the signature of the debtor, for the express purpose of being used hereafter as evidence of an agreement to pay interest at the particular rate specified, must be regarded as a stipulation to pay interest within the meaning of the proviso to Art. 5 so as to make the document a memorandum of an agreement within the meaning of Art. 5 of the same schedule; and a document, described as a sarkhat, which, in addition to acknowledging a debt, contains, over and above the said acknow-

ledgment, a note of the rate of interest to be payable hereafter on the debt thus acknowledged, is a document of the foregoing description.

[P 199 C 1]

(b) Stamp Act (2 of 1899), S. 12—Cancellation of stamp depends on facts of each case—Cancellation effected by writing across illustrated.

The question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must be considered with reference to the facts of each particular case. Where a person writes his name close to a stamp on its left side, and continues the line which forms the upper portion of the writing in the Hindi character across the face of the stamp, and immediately against the right hand edge thereof, continues his writing by the insertion of words of formal acknowledgment, this is an effectual cancellation of the stamp within the meaning of S. 12.

[P 199 C 2]

Kamalakant Varma—for Appellant.

Lakshmi Narain—for Respondent.

Piggott, J.—The suit out of which this appeal arises was brought by the plaintiff for the recovery of money lent with interest. As regards one portion of the claim the plaintiff did not profess to support it by documentary evidence. At the hearing he offered to be bound by the defendant's statement on oath. When thus examined the defendant, although he had denied all liability in his written statement, admitted having borrowed a sum of Rs. 125 on a certain date. The first Court accordingly passed a decree for this sum, with interest by way of damages, and dismissed the rest of the claim. In respect of the portion of the claim thus dismissed the plaintiff tendered in evidence a certain document described as a sarkhat. One of the matters in controversy which has not yet been tried out is the date on which this document was executed, there being a discrepancy between the year of execution as stated in the first part of the document and that stated in a later portion of the same. The defendant's case was that he had in fact incurred the liability referred to in this paper and had written his signature and other words importing acknowledgment upon the paper produced, but that this liability had been subsequently discharged by him. The learned Munsif however did not try out the case on this basis. It is a little difficult to understand how he purported to deal with this document described as a sarkhat. He must at one stage at least have treated the said paper as evidence in the case, for he examined

the defendant Mahadeo upon it and recorded his admission as to his signature and other words in the Hindi character appearing thereon.

In the end however he came to the conclusion that the document was not admissible in evidence at all. He did this upon an objection taken by the defendant regarding the cancellation of the adhesive stamp of one anna which appears on the face of the document. Referring to the provisions of S. 12, Stamp Act 2 of 1899, he held that there had been no effective cancellation of this stamp, and it followed as a consequence that the document must be treated as not stamped at all. The document itself might in its turn be regarded as a mere acknowledgment of the debt, within the meaning of those words as used in Art. 1, Sch. 1 to the Stamp Act aforesaid.

On this view the document was chargeable with a stamp duty of one anna and, if the learned Munsif was right in treating it as virtually unstamped, this was a defect which could not be cured by the imposition of any penalty. Having thus rejected the document as inadmissible, the learned Munsif went on to hold that the claim in respect of the debt therein referred to was not proved and upon this he dismissed this part of the claim. He got rid of the defendant's admission of liability by accepting the defendant's statement in its entirety, according to which the written acknowledgment had been given on the earlier of the two dates appearing on the face of the document, with the result that the suit on the date on which it was filed would have been barred by limitation. The learned District Judge in appeal has held that the document in question is not a mere acknowledgment of a debt. It is that undoubtedly; but it contains, over and above the said acknowledgment, a note as to the rate of interest to be payable hereafter on the debt thus acknowledged. The learned District Judge holds that this amounts to a stipulation to pay interest at the specified rate, within the meaning of the proviso to Art. 1, Sch. 1 already referred to. He holds therefore that the document, besides being an acknowledgment of a debt is a memorandum of an agreement within the meaning of Art. 5 of the Schedule and is therefore liable to pay a stamp duty of eight annas. He has ordered the duty and penalty to

be levied and the document to be admitted in evidence subject to payment of the same. In consequence of this order the learned District Judge observes that there has been no real trial on the merits in respect of this part of the claim, the real question in issue being whether the debt was contracted, or formally acknowledged by the defendant, on the earlier or on the later of the two dates appearing on the face of the disputed document.

It is certainly open to argument whether on this view of the case, the learned District Judge would not have complied more strictly with the provisions of the Code of Civil Procedure by remitting an issue for the determination of the first Court, and then finally disposing of the appeal in accordance with the finding which might be arrived at on the issue so remitted. The learned District Judge, however has preferred to deal with the case on the basis that the claim, so far as it related to the sum referred to in the sarkhat, had been disposed of by the first Court upon a preliminary point, and he has passed an order of remand under O. 41, R. 23, Civil P. C. The appeal before us is against this order of remand, and as no exception is taken in the memorandum of appeal to the particular procedure adopted by the District Judge, it does not seem necessary for us to raise any question on the point. The points argued before us are two: first, whether the document in question is a mere acknowledgment of a debt, falling under Art. 1, Sch. 1 to the Stamp Act, or is also a memorandum of an agreement, liable to a duty of eight annas under Art. 5 of the same schedule; secondly, whether or not the adhesive stamp of one anna on this document has been effectually cancelled within the meaning of S. 12 of the same Act. On the first of these points a number of authorities were cited to us.

It may be remarked at once that all authorities anterior in date to the passing of Act No. 2 of 1899 require to be reconsidered in the light of the proviso to Art. 1, Sch. 1 which was added by the enactment aforesaid. I would also remark further that when all is said and done, each reported decision must be considered strictly with reference to its own circumstances and the precise terms of the particular document under consideration by the Court. There are decisions

of at least of two High Courts, since the passing of Act 2 of 1899, which lend a great deal of support to the view taken by the learned District Judge. The cases are *Laxumibai v. Ganesh Raghunath* (1) and *Mulchand Lala v. Kashibullav Biswas* (2). Each of these decisions seems to turn upon the view that a memorandum of the rate of interest to be payable in future, when appended to an acknowledgment of debt over the signature of the debtor, for the express purpose of being used hereafter as evidence of an agreement to pay interest at the particular rate so specified, must be regarded as involving a stipulation to pay interest within the meaning of the proviso to Art. 1 of the schedule, so as to make the document a memorandum of an agreement within the meaning of Art. 5 of the same schedule. If the matter came before this Court absolutely as *res integra*, I should feel no hesitation in expressing my own agreement with these decisions. There are however two cases of this Court upon which considerable stress has been laid on the other side. These are *Udit Upadhyaya v. Bhawani Din* (3) and *Dulmha Kunwar v. Mahadeo Prasad* (4). The documents dealt with by the learned Judges of this Court in the second of these two cases were so differently worded from the one now before us that it is doubtful how far the decision in that case throws any light on the question under consideration. The case was a peculiar one and the learned Judges based their decision upon a variety of circumstances, of which the question of the admissibility of the two documents concerned was only one. The conclusion which they came to, as a matter of fact, was that the documents in question were not liable to stamp duty at all; and in the present case, of course, if we found it possible to take the same view regarding the sarkhat now under consideration, the only result would be that we should affirm the order of remand.

The earlier of the two Allahabad cases bears a closer resemblance to the one now before us. Taking the decision as a whole, I think it may be said that the learned Judges regarded the question as one not free from difficulty, but had

(1) [1901] 25 Bom. 373.

(2) [1908] 35 Cal. 111.

(3) [1904] 27 All. 84.

(4) [1906] 28 All. 436.

formed so strong an opinion in favour of the plaintiff's case on the merits that they were most reluctant to come to any decision which would have the result of excluding from the consideration of the Court the document upon which the said plaintiff relied. Moreover the contention raised before them on behalf of the defendants respondents was that the said document fell within the definition of a promissory note, and this was the contention which was repelled by the learned Judges in their decision. The question whether it amounted to a memorandum of an agreement, within the meaning of Art. 5, Sch. 1, does not seem to have been discussed or considered. It has been pressed upon us on behalf the appellant in this case that a practice has grown up in these provinces, perhaps in consequence of the two decisions above referred to, of appending a memorandum as to the rate of interest payable to acknowledgments of liability signed by the debtor, and treating such documents as mere acknowledgments liable to no more than a stamp duty of one anna. There may be some force in this contention, and I feel that we ought to be reluctant to disturb any settled practice which may have grown up under previous decisions of this Court. At the same time, as a mere question of law considered with reference to the wording of Arts. 1 and 5 of the schedule already referred to, I am bound to say that the document which we are now considering does, in my opinion, contain a stipulation to pay interest at the rate therein specified, within the meaning of the proviso to the first of these Articles, and does amount to a memorandum of an agreement to pay interest at the said rate within the meaning of Art. 5.

For myself however I should prefer to base my decision upon a clear finding that there has been an effective cancellation of the one anna adhesive stamp on this document within the meaning of S. 12, Act 2 of 1899. A similar question came before a Bench of the Oudh Court of which I was a member [*Mohammad Amir Mirza Beg v. Babu Kedar Nath* (5)]. Mr. Lindsay and I concurred in holding that the stamp produced before us, which had been cancelled by having three lines drawn across it in different directions, each of the said lines extending more or less beyond the edges of the

stamp on to the paper on which the document was written, had been cancelled in a sufficiently effectual manner to satisfy the provisions of S. 12, Act 2 of 1899. We noticed at the time that there was a decision of the Bombay High Court in a different sense, namely, a case reported as *Virabhadrapa v. Bhimaji* (6). But we regarded the two cases as to some extent distinguishable, and as a matter of authority we preferred to follow a decision of the Chief Court of the Punjab to which reference is made in our reported judgment *Piran Ditta v. Mangal Singh* (7). The question whether a particular adhesive stamp has or has not been cancelled in a sufficiently effectual manner, so that it cannot be used again, is one which must obviously be considered with reference to the facts of each particular case. In the case now before us the defendant-appellant has written his name close to the stamp on its left hand side. He has then continued the line which forms the upper portion of the writing in the Hindi character across the face of the stamp, and immediately against the right hand edge thereof has continued his writing by the insertion of words of formal acknowledgment. In all probability the only reason why he did not write across the face of the stamp was that he regarded it as unlucky, or improper, to deface the Royal image by such writing.

That he intended to effect a definite cancellation of the stamp seems to me beyond question, and also that both parties at the time regarded the cancellation as sufficient. It seems to me impossible to treat the words of S. 12, Stamp Act, as requiring such a degree of cancellation as would make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp label. It must be a matter of common knowledge that even the system of cancellation prescribed under the orders of the Government for Court-fee labels affixed to records and papers filed in the course of civil litigation, has been defeated by fraudulent practices entered into by collusion with members of the record-room staff; yet it could not be suggested that the system of punching prescribed by the Government orders for such labels was not *prima facie* an

(6) [1904] 28 Bom. 432.

(7) [1908] 207 P. W. R. 1908.

(5) [1912] 15 O. C. 58=15 I. C. 202.

adequate cancellation of the stamp within the meaning of the law. I think a matter of this sort should be dealt with in a fair and equitable spirit and with a presumption in favour of honest dealing rather than of a deliberate intention to lay the basis for a subsequent fraud on the revenue. In my opinion the stamp on the document now before us has been sufficiently cancelled within the meaning of the law, and the question upon which the two Courts below have differed does not strictly arise for determination. Under the circumstances of the case, no objection having been taken by the plaintiff, and the order of the District Judge having presumably been complied with so far as the plaintiff is concerned, I think the proper course for us is simply to dismiss this appeal, and I would do so accordingly with costs.

Walsh, J.—I entirely agree. As the matter has been so fully discussed, I propose to add a word or two on both points. In my opinion this document is plainly a memorandum of agreement within the terms of Article 5 of the Schedule to the Stamp Act, and any other view is almost unarguable. It is true that it contains an acknowledgment of liability for a definite sum but it also contains a term to pay interest thereon, involving future liability. I agree with the view taken in the cases of *Mulchand Lala v. Kashibullav Biswas* (2) and *Enatullah Biswas v. Gajarudai Biswas* (8), each of which bears a similarity to this case. Without venturing to differ from the view taken in *Udit Upadhya v. Bhawani Din* (3), I note that the Chief Justice in that case described the document in the following language:

To us it appears to be nothing more than a mere memorandum or note drawn up between the parties as to a transaction which had just been settled between them."

That is a description of a memorandum of agreement and would have brought the document within Art. 5 if the point had been taken. I agree with my brother that it would appear from the report in *Udit Upadhya v. Bhawani Din* (3) that the point was not present to the Chief Justice's mind. On the other point I agree entirely with my brother Piggott's judgment in *Oudh Cases, Mohammad Amir Mirza Beg v. Babu Kedar Nath* (5). All that a Court has to look at, in

my judgment, under S. 12, is whether the adhesive stamp has been in any effectual manner cancelled so that it cannot be used again. I think that means that it cannot lawfully or conscientiously be used again. My brother has pointed out in a passage which I cannot do better than quote:

"It is difficult to see how any one without destroying an adhesive stamp altogether can so cancel it as to make it absolutely impossible for an expert forger to remove the mark and make use of it elsewhere."

It is not everybody who can write with success upon a recently affixed adhesive stamp. A stamp may be almost entirely defaced by accidentally upsetting ink all over it. That would not be a cancellation. On the other hand a line deliberately drawn through it with the object of cancelling it is, in my opinion, as effectual a cancellation as writing part of a signature or of a date upon it. It is the method adopted by some banks for cancelling the name on a cheque which has been paid. In this case the writer chose to sign his name on one side of the stamp, to add certain requisite particulars on the other side of the stamp and to unite the two pieces of writing by a continuous line drawn across the stamp. I think that was an effectual cancellation and I agree with the Oudh case that whether the requirement of the law as to the cancellation of the stamp has or has not been sufficiently met is a question to be determined upon examination of the document in each particular case. The result in this case is that the plaintiff must treat this document as covered by Art. 5 and pay the additional duty.

By the Court. — We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 200

TUDBALL, J.

Ram Sarup—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. No. 192 of 1918, Decided on 26th October 1918 for transfer of a case pending in the Court of the Sess. Judge, Farrukhabad.

Criminal P. C. (1898), Ss. 344 and 526—Sessions trial once begun should be continued *de die in diem*—Single day fixed for trial—Trial not possible to be completed in

(8) [1907] 11 C. W. N. 1122.

one day — Sessions Judge should postpone trial—Refusal is ground for transfer.

Ordinarily a Sessions trial once begun should be continued *de die in diem* until it is finished. No such case should be adjourned for hearing except for very good reasons. [P 201 C 2]

When a single day was fixed for a Sessions trial and it was obvious that owing to the large number of witnesses to be examined the trial could not be completed on that day:

Held, (1) that under these circumstances the Sessions Judge should have postponed the trial to some subsequent date when it could be continued *de die in diem*. [P 202 C 1]

(2) that the refusal of the Sessions Judge to postpone the trial was a ground for transferring the case to some other Court. [P 202 C 2]

G. P. Boy and Satya Chandra Mukerji—for Applicant.

A. E. Ryves—for the Crown.

Judgment.—This is an application for the transfer of the case of *King-Emperor v. Ram Sarup* pending in the Court of the Sessions Judge of Farrukhabad to some other Court either in that district or any other district. The ground on which the application is pressed is based on the facts to be found stated in Para. 9 of the affidavit filed with the application. It is an allegation to the effect that in the week between 9th and 14th September last the Presiding Judge adopted a practice in regard to the disposal of his work which made it very difficult, if not impossible, for an accused person to properly defend himself. The allegations are that the Sessions Judge fixed only one day for each Sessions case, whatever the number of witnesses to be heard; that he commenced very early in the morning, sat through the day and continued the case till late in the evening; with the result that the counsel engaged on both sides were reduced more or less to a state of exhaustion and were unable to do justice to their cases. The case which is now in question was called for hearing at about 11-15 A. M. There were twelve witnesses for the prosecution and twenty-seven for the defence. The date was 13th September, for the 14th September was fixed another heavy case. It was therefore clearly impossible for the present case to have been tried and completed on 13th September. An application was then made to the Court on the same day when the case was called, asking for an adjournment in order to enable the accused to apply to this Court for transfer of the case. The grounds on which the application was intended to be made were also set forth at the request

of the Judge below in the application for adjournment. Two grounds were mentioned therein, one of which requires no consideration at the present moment as it is admitted that it was stated in error. The second ground was as follows:

"Moreover only one day has been fixed for this case in which twelve witnesses have been summoned for the prosecution and a large number (I believe over twenty-five) for the defence. The case can begin sometime about 11-15 A. M. and the witnesses for the prosecution can be finished late in the afternoon about 4 or 5 P. M. If the Court sits after that hour and takes the evidence for the defence, the lawyers engaged would be too tired to do their duty by their clients and his interest would suffer if the evidence is prolonged late in the evening."

There is an order below this granting the application for adjournment and fixing 9th October with a note on this ground. In regard to the second ground the order runs as follows:

"A further reason given is that the case would begin about 11-15 A. M. and the vakil thinks there would not be time for all the witnesses to be heard to-day. In that case an application for adjournment could have been made at the end of the day but no such application or request has been made. There was time between 30th August and to-day to move the Hon'ble High Court to transfer the case, but no steps have been taken till to-day."

The learned Sessions Judge in answer to this application has submitted a note in which he has given his reason for fixing the 13th of September for the hearing of this case. He says:

"It seemed best to fix the 13th September for this case and if that date proved insufficient, to give further dates for hearing on 9th October and subsequent dates."

Admittedly the 13th of September was the only vacant date on his list. It seems equally clear that one day was an utterly insufficient allowance of time for the trial of this case. Ordinarily a Sessions trial once begun should be continued *de die in diem* until it is finished. No such case should be adjourned for hearing except for very good reasons. It necessitates a further attendance on the part of both the witnesses and the assessors (whose memory of the evidence is bound to fail in consequence), and it has repeatedly been laid down by this Court that when once a case has begun, even in civil litigation, it should, if possible, be heard *de die in diem*. The learned Judge's fixing of 13th September for the trial of this case was obviously inadvisable. He refers to an application which had been made for the transfer of the criminal case fixed for 14th Septem-

ber. He remarks that it appeared likely that the 14th September would also be free. On this he obviously could not count, for in the result the case fixed for 14th September was not transferred. In paragraph C of his note the Sessions Judge remarks:

"The learned vakil for the applicant was informed, when the case was called on in the morning of 13th September, that if more time was required for the case it would be heard on further dates beginning from 9th October."

This may have been so, but the practice in adjourning such a case is obviously an improper one, as I have already pointed out above. The learned Judge further remarks that the learned vakil intimated that he did not want to do any work during the vacation, which remark appears to have been based upon something said not by the learned vakil but by another gentleman in Court. The latter part of this clause ends with a surmise that the learned vakil was not prepared in the case and was not prepared to go on with it. This appears to be pure surmise and without any basis whatsoever and seems to have arisen out of remarks which passed between the Bench and the Bar on the day in question. In regard to the allegation made in para 9 of the affidavit, the Judge has merely remarked that this allegation dealt with the trial of other cases in the previous four days and had nothing to do with the present case and that he is prepared to furnish an explanation if called upon. This is rather avoiding the point which has been raised in the affidavit, and that point is that the practice of the Court for the four preceding days had been such as to show to the accused and his learned vakil that it would be practically impossible on 13th September to place the accused's case properly before the Court. If the learned Sessions Judge would only think, he would see that it was obviously impossible for Counsel engaged in the case to work from early morning till late in the evening. The hours during which his Court should be open have been laid down by this Court, and it is only in exceptional cases and for exceptional reasons that any deviation should be made from the rule. The actions of the Judge, in my opinion, has been decidedly inadvisable and in a certain sense improper. The 13th September ought never to have been fixed for the trial of this case. It obviously

could not be tried on that date and if he had been well advised the Judge would, on 13th September without any further question, have adjourned the case straight away as it was impossible for him to finish it. The Judge's vacation was to begin on 15th September, Saturday the 14th September being the last working day. It is obviously unfair to the public as well as to the Bar to adopt the procedure which the learned Judge did adopt on this occasion and the accused was justified in putting in his protest. In the circumstances, therefore, and in view of the friction which has arisen in the matter, I think it advisable to transfer this case and I hereby direct that it be transferred to the Court of the Assistant Sessions Judge of Farrukhabad for trial.

V.B./R.K.

Case transferred.

A. I. R. 1919 Allahabad 202

BANERJI, J.

Haidar Khan and others—Plaintiffs—Appellants.

v.

Chand Khan and others—Defendants—Respondents.

Second Appeal No. 412 of 1917, Decided on 27th March 1919, from decision of Dist. Judge, Meerut, D/- 1st March 1917.

Mahomedan Law—Succession—Possession of brother amounts to possession of sisters also unless brother repudiates claim of sisters—Cosharer, adverse possession.

In a Mahomedan family the possession of a brother should be deemed to be the possession of his sisters also unless the brother repudiates the claim of the sisters and asserts a right in himself. Apart from Mahomedan law however the possession of one cosharer would be regarded on behalf of all the other cosharers, unless there is any act on the part of the cosharer in possession which amounts to the ouster of the other cosharers.

[P 203 C 1]

S. M. Sulaiman—for Appellants.

Tej Bahadur Sapru and G. Agarwala—for Respondents.

Judgment.—This is an appeal against a decree of the lower appellate Court dismissing the suit of the plaintiffs for possession of a half-share in a certain property. The aforesaid property belonged originally to one Jamiat Khan, who died many years ago leaving a son, Chand Khan, and three daughters. One of the daughters, Mt. Rani, has died childless. Plaintiff 1 is the son of one of the daughters, Mt. Shitabo, and plain-

tiffs 2 and 3 are the grandsons of another daughter, Mt. Daleha. Chand Khan's name was entered in the revenue papers in regard to the property and he made several mortgages in favour of Mohan Lal, defendant 2, who has got a decree on his mortgages. The plaintiffs assert that the daughters of Jamiat Khan were in possession of their shares. According to Mahomedan law half of the property of Jamiat Khan went to Chand Khan the son, and the other half was inherited by his sisters the ancestors of the plaintiffs. It is this half-share of which plaintiffs claim possession and they assert that Chand Khan had no right to mortgage that share. The plaintiffs allege that the daughters of Jamiat Khan, and after them the plaintiffs have been in enjoyment of the profits of the property and that Chand Khan had no exclusive right to take the property or to make the mortgages. The suit was defended on the ground of adverse possession and also on the ground that the mortgagee took the mortgages on faith of the entries in the revenue papers and that S. 41, T. P. Act and S. 115, Evidence Act, protected him and barred the plaintiffs' claim. The Court of first instance dismissed the suit and the lower appellate Court affirmed the decree of that Court. The learned Judge in his judgment says,

"though Chand Khan's sisters were heirs of the property they never put forward any claim to it and there is no evidence worth the name that they had ever been in possession of the shares."

This view of the learned Judge is not correct. In a Mahomedan family the possession of the brother should be deemed to be the possession of the sisters also unless he repudiated the claim of the sisters and asserted a right in himself. Even if the family had not been a Mahomedan family, the possession of one co-sharer would be deemed to be the possession of the other co-sharers unless the co-sharer in possession had done any act which would amount to an ouster of the other co-sharers. This view was held by their Lordships of the Privy Council and has been held by this Court in several cases to which I deem it unnecessary to refer. The learned Judge ought, therefore to have found whether Chand Khan denied the title of his sisters and excluded them altogether from the property. S. 115, Evidence Act has no application to the present case. The sisters did nothing

which induced the mortgagee to take a mortgage of the property. That section is clearly no bar to the present suit.

The mortgagee relied on S. 41, T. P. Act but in order to make that section applicable it was necessary to find not only that the brother Chand Khan was put forward as ostensible owner of the property but it must also be found whether the mortgagee after taking reasonable care to ascertain that the transferor to him had power to make the transfer had acted in good faith. The learned Judge has not found whether the mortgagee made any inquiry whatsoever. In order to enable this Court to decide the appeal it is necessary to have findings from the Court below on the following issues which I refer to that Court under O. 41, R. 25, Civil P. C. : (1) Were the daughters of Jamiat Khan and after them the plaintiffs in receipt of the profits of the property owned by Jamiat Khan? (2) Did Chand Khan ever deny the title of his sisters and set up in himself a right adverse to them? If so when and in what manner and were the sisters aware of his act? (3) Did the mortgagee Mohan Lal make any inquiry as to the title of Chand Khan and did he act in good faith? The Court will take such additional evidence as the parties may adduce relevant to the above issues and on receipt of its finding ten days will be allowed for filing objections.

V.B./R.K.

Order accordingly.

A. I. R. 1919 Allahabad 203

RAFIQUE AND LINDSAY, JJ.

Sangto—Plaintiff—Appellant.

v.

Paras Ram and another—Defendants—Respondents.

First Appeal No. 23 of 1917, Decided on 22nd January 1919, from decision of Addl. Sub-Judge, Saharanpur, D/- 28th September 1916.

Civil P. C. (1908), S. 92—Suit falling within provisions of S. 92 and not complying with requirements of section is not maintainable.

The provisions of S. 92 are mandatory and bar a suit for any of the reliefs mentioned in the section except by a suit properly constituted in accordance with the section. [P 205 C 1]

Having regard to the provisions of sub-section (2) of S. 92 it is not only the right of the plaintiff that has to be looked to but also the nature of the relief which the plaintiff seeks, and if the relief asked for is one which is specified in sub-S. (1), the direction laid down in the section must be obeyed. [P 205 C 1]

By a compromise defendants 1 and 2 were declared trustees of certain wakf property and it was declared that the plaintiff was entitled to get accounts from them. Plaintiff brought a suit for accounts against defendants 1 and 2 and for a declaration that defendants 3 and 4 had no concern with the management of the trust property:

Held: that the suit fell within the provisions of S. 92 and that the requirements laid down by the section not having been complied with, the suit was not maintainable. [P 205 C 1]

Nihal Chand—for Appellant.

Haider—for Respondents.

Judgment.—It appears that one Mt. Mangla built a temple in the town of Kankhal many years ago. She was a spinster and in 1873 she adopted one Har Dayal as her son. He predeceased her leaving him surviving two widows Mt. Thakuri and Mt. Sangto.

Mt. Mangla created a trust in favour of the temple that she had built by means of two wills of 1896 and 1900, dedicating all her property to the deity (Thakurji). In the two wills by which she dedicated the property, she appointed Bhikam Singh, a relative of her brother Megh Singh, as muttawali of the dedicated property, and further stated that after Bhikam Singh, the eldest member of the family of Megh Singh would be the trustee. At the time of her death Bhikam Singh was away at his own village in the Kangra Valley and the widows of Har Dayal, the adopted son, obtained mutation of names in their favour from the Revenue Court in respect of the wakf property, describing themselves as managers. In 1906 Paras Ram and Ralla Ram, after obtaining sanction under S. 539 of the old Civil P. C. sued for the removal of Mts. Thakuri and Sangto from the managership of the wakf property, on the allegation among others that they were mismanaging the property. The two ladies defended the suit by denying that they were managers of the wakf. They said that their husband, Har Dayal, was the absolute owner of the property and that they had inherited it from him. The learned District Judge found that the property was wakf and that the two ladies had obtained possession as managers and had been guilty of mismanagement. He accordingly ordered their removal and appointed Paras Ram as the manager of the property. The two ladies preferred an appeal to this Court and the decree of the first Court was set aside

and the case was remanded for trial for reasons which do not appear on this record. After the remand there was a compromise between the parties under which Paras Ram and Bhagwan Singh were admitted to be the managers and trustees of the property and the right of Mt. Sangto to get accounts from them was declared. The compromise is dated 26th July 1909. Presumably a decree in terms of the compromise was passed. The result of the former litigation was that Paras Ram and Bhagwan Singh were appointed managers of the wakf property.

On 3rd January 1916 the suit out of which this appeal has arisen, was brought by Mt. Sangto against Paras Ram, Bhagwan Singh and two others for two reliefs, namely first, that Paras Ram and Bhagwan Singh be made to render accounts of the wakf property from 1905, that is after the death of the former manager up to the date of the institution of the suit, and, secondly, that Ralla Ram and Dewan Chand, defendants 3 and 4, be declared to have no concern with the management and collection of the income of the wakf property. The second relief was asked for on the allegation that defendants 3 and 4 were without any right taking part in the management of the wakf property. The claim was resisted on various pleas. One of the objections raised for the defence was that the suit was not maintainable, inasmuch as the provisions of S. 92, Civil P. C., had not been complied with. The learned Subordinate Judge allowed this plea and dismissed the claim. Mt. Sangto in her appeal to this Court contends that her suit is maintainable. It is argued on her behalf that under the compromise of 26th July 1909 she was given the right to claim accounts from defendants 1 and 2. It is on the basis of that compromise that she is now asking for rendition of accounts. As to the relief with regard to defendants 3 and 4, it is against persons who have no concern with the management of the wakf property and may therefore be considered to be trespassers, and hence the provisions of S. 92, Civil P. C. do not apply to her case. In developing his argument the learned counsel for the appellant suggested that defendants 1 and 2 were not the managers of the wakf property, but were only agents for the appellant and therefore the pre-

sent suit is not one of the nature contemplated by S. 92, Civil P. C.

Having regard to the former litigation and the decree in that case as also the language of the compromise, this contention of the learned counsel for the appellant is untenable. It is quite clear from the said document that defendants 1 and 2 were appointed trustees under a decree passed in a suit properly constituted under S. 539 of the old Civil P. C. The compromise on the strength of which the plaintiff claims accounts does not, in our opinion, enable her to evade the provisions of S. 92. All that can be said on the basis of the compromise is that she is interested in the wakf property and can claim accounts from the trustees in a properly constituted suit. To put it differently she can go to the proper authority and show the compromise in order to move him in the matter. The compromise gives her an interest in the wakf property. Having regard to the provisions of sub-S. (2), S. 92, Civil P. C., it is not only the right of the plaintiff that has to be looked to, but also the nature of the relief which the plaintiff seeks, and if the relief asked for is one which is specified in sub-S. (1), the direction laid down in the section must be obeyed. The provisions of S. 92 are mandatory and bar a suit for any of the reliefs mentioned in it except by a suit properly constituted in accordance with that section. The real relief sought in the case was with regard to the rendition of accounts. The other relief was merely ancillary and may be disregarded for the purposes of this appeal. We agree with the lower Court in holding that the suit is not maintainable. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 205

RAFIQUE, J.

Shanker Lal and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 202 of 1919, Decided on 22nd May 1919, against order of Dist. Magistrate, Farrukhabad, D/- 12th March 1919.

Criminal P. C. (1898), Ss. 110 and 125 — Security for good behaviour—District Magistrate cannot under S. 125 cancel bond executed on order under S. 110—Proper course

is to submit case to High Court with recommendation that bond be cancelled.

Section 125 does not confer appellate or revisional jurisdiction upon a District Magistrate enabling him to cancel a bond executed in pursuance of an order under S. 110 of the Code, upon an application made to him in this behalf. The proper course in such a case is for the District Magistrate to submit the case to the High Court with a recommendation that the bond be cancelled, if he is of opinion that this should be done. [P 206 C 1]

Uma Shankar Bajpai — for Appellants.

Sital Prasad Ghosh — for Opposite Party No. 1.

R. Malcomson—for the Crown.

Judgment.—The facts which have given rise to this application in revision are as follows: One Daryai Singh was the owner of certain fields. He gave a lease in respect of them to Bikram Singh and subsequently gave a mortgage in respect of the same fields to Karam Singh, the brother of Bikram Singh. After the execution of the lease and the mortgage deed Daryai Singh sold the said fields to one Sardar Singh. There was a dispute between the vendee on the one side and the lessee and the mortgagee on the other, as to the possession of the fields. Sardar Singh was successful in the end and obtained a decree from this Court to the effect that the lease to Bikram Singh was void and ineffectual but that the mortgage was valid. After the decree of the High Court, Sardar Singh redeemed the mortgage and obtained possession over the fields in question through the civil Court. Sardar Singh died sometime after the redemption of the mortgage. The son of Sardar Singh let the fields in question to some of the applicants. The latter were resisted in their attempt to show the fields by Bikram Singh and his friends, who declined to give up possession and maintained that the lease in his favour gave him the right to retain the fields. The police, finding that there was a likelihood of a breach of the peace sent up both parties, namely, the applicants and Bikram Singh and his friends to the Magistrate with a report that security should be taken for keeping the peace under S. 107, Criminal P. C. The case came up before the learned Joint Magistrate, who made an order on 19th December 1918 directing both parties to give bonds for keeping the peace. Bikram Singh went up in revision to the Sessions Judge from the

order of 19th December 1918 and his application was rejected on 10th February 1919. Before the disposal of the application by the Sessions Judge, Bikram Singh filed an application to the District Magistrate which was either by way of revision or appeal. The application was filed on 8th February 1919.

The learned District Magistrate went into the merits of the case and considered the rights of the parties and came to the conclusion that the bonds taken from Bikram Singh and his friends should be cancelled and those taken from the applicants before this Court should be maintained and that the latter should go to the proper Court to have their rights determined. The applicants before this Court contend that the order of the learned District Magistrate is not according to law, though it purports to have been made under S. 125, Criminal P. C. I think that the contention for the applicants is correct. The learned District Magistrate has disposed of the order of 19th December 1918 as if he were sitting as an appellate Court. The proper course open to the learned Magistrate was to have considered the application of Bikram Singh and others as an application for revision and to have recommended to this Court the cancellation of the bonds of Bikram Singh and his friends, if he thought it proper to do so. The case of *Banarsi Das v. Par-tab Singh* (1) is in point. I allow the application and set aside the order of the learned District Magistrate, dated 12th March 1919.

V.B./R.K. Application allowed.

(1) [1914] 25 All 103=18 I. C. 135.

A. I. R. 1919 Allahabad 206

BANERJI, J.

Mt. Bashirunnisa and others—Plaintiffs—Appellants.

v.

Bunyad Ali and another—Defendants—Respondents.

Second Appeal No. 639 of 1917, Decided on 27th March 1919, against the decree of Addl-Judge, Moradabad, D/- 7th March 1917.

Mahomedan Law—Marriage—Witnesses need not be of particular type—Witnesses must be present—Marriage without witnesses is merely irregular.

Under the Mahomedan law, it is not necessary that the witnesses to a marriage should be of a particular type or a particular class: all that is

necessary is that there should be present witnesses to attest the conclusion of the contract. A marriage contracted without witnesses however is not illegal; it is merely irregular and the irregularity would be cured by consummation of the marriage. [P 207 C 1]

S. M. Sulaiman—for Appellants.

Gokul Prasad and Baleshwari Prasad—for Respondents.

Judgment.—The suit which has given rise to this appeal was brought by Mt. Bashirunnisa and two purchasers from her for partition of two sihams out of eight sihams of property alleged to have belonged to one Khadim Ali. Bashirunnisa stated that she was the second wife of Khadim Ali and as such was entitled to two sihams out of eight sihams. Khadim Ali died in May 1916 leaving no issue. The defendants are his brother and sisters. If Mt. Bashirunnisa was the widow of Khadim Ali she inherited the share claimed by the plaintiffs. The defendants however denied that Mt. Bashirunnisa was married to Khadim Ali and they stated that she lived with him as a servant and cook. They also raised a question as to the ownership of the houses claimed. The Court of first instance found in favour of the plaintiffs and decreed the claim. The defendants appealed and in their appeal in the lower appellate Court the only question which they raised was whether it had been proved that Bashirunnisa was the lawfully married wife of Khadim Ali. Bashirunnisa had a husband who died some years ago. It is alleged that after the death of her first husband she was married to Khadim Ali who was about 70 years of age. It was proved that she lived with Khadim Ali for nearly seven years in the same house, and it is manifest from the evidence and the finding of the Court of first instance that they lived as man and wife. It has also been proved that Khadim Ali whilst identifying Mt. Bashirunnisa before the Sub-Registrar at the time of the registration of a sale deed executed by her in regard to property inherited by her from her first husband stated that she was his second wife. In addition to this the learned Munsif found that there were two witnesses to prove the fact of the marriage. In spite of all this evidence, the learned Judge of the lower appellate Court has dismissed the suit on the ground that it had not been proved that Bashirunnisa was legally

married to Khadim Ali. The learned Judge says that no "formal" witnesses to the marriage have been produced although two witnesses have sworn that in their presence the marriage took place. The learned Judge cites a number of authorities, the effect of which is to lay down that amongst Sunnis it is necessary for the validity of a marriage that there should be a proposal and acceptance by the contracting parties in the presence and hearing of two male or one male and two female witnesses. What the learned Judge means by "formal witnesses" it is difficult to understand. In the present case, as stated above, there are two witnesses who stated that in their presence the marriage was celebrated, the nikah was read by the Maulvi and the dower was fixed.

The contracting parties were persons of advanced years and the lady was personally known to the persons who performed the marriage ceremony. I have had the evidence of the witnesses Sharafat Ali and Abdul Salam read out to me. Both of them depose that they were present at the time when Bashirunnisa was married to Khadim Ali and that in their presence the marriage took place, the formula was read and the dower was fixed. It is not necessary, according to Mahomedan law, that the witnesses should be of a particular type or a particular class. All that is required is the presence of two witnesses at the time of the contract of marriage; and such witnesses we have in this case. In addition to the witnesses we have the admission of Kadim Ali that Bashirunnisa was his second wife and we have the further fact that they lived together for nearly seven years. According to Mr. Ameer Ali (see Mahomedan Law, Vol. 2, Edn. 3, p. 325), what is necessary is that there should be witnesses present to attest the conclusion of the contract, but a marriage contracted without witnesses is not illegal. If there were no witnesses to the contract the marriage would be irregular and this irregularity would be cured if the marriage was consummated. In the present case there was no illegality or irregularity in the marriage, and if there was any irregularity that was cured by the fact that the two lived together for nearly seven years, a fact from which consummation of the marriage may be

reasonably presumed. In my opinion, the decree of the lower appellate Court was incorrect, and the view which the learned Judge took is too technical to be accepted. This being the only question which was urged in the Court below, and the finding of the Court below on that question being, in my opinion erroneous, I allow the appeal, set aside the decree of the Court below and restore that of the Court first instance. The appellants will get their costs in all Courts including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 207

TUDBALL, J.

Bhim Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 716 of 1918, Decided on 28th November 1918, from order of Sess. Judge, Kumaun.

Criminal P. C. (1898), Ss. 94 and 165—Search of house of person suspected of theft—Assault on Police Officer conducting search is offence within Penal Code (1860), S. 353.

Accused's brother was suspected of having committed a theft of some property from his master. The complainant, an Inspector of Police, went to search his quarters, whereupon the accused assaulted complainant.

Held: that the accused's brother being a mere suspect at the time of the attempted search, the search was not illegal and was justified under Ss. 94 and 165, Criminal P. C., and that the accused was therefore guilty of an offence under S. 353, Penal Code. [P 207 C 2]

*M. L. Agarwala—*for Applicant.

*R. Malcomson—*for the Crown.

Judgment.—The applicant has been convicted under S. 353, I. P. C., of having caused simple hurt to a police officer in execution of his duty. He is a brother of one Sham Singh, who was suspected of having committed theft of some property from his master. Inspector Mours went to search his quarters, whereupon the applicant Bhim Singh assaulted him. The plea taken is that the search attempted to be made by Inspector Mours was not authorised by law under S. 165, read with S. 94, Criminal P. C., in that Sham Singh was an accused person. With this contention I cannot possibly agree. Ss. 94 and 165 are perfectly plain and their language is wide enough to cover the case. In the first place, at the moment of the attempted search Sham Singh was not an accused person. It is true that he was suspected but nothing more,

and he is clearly a person to whom an order could have been issued under S. 94, and as in the circumstances it was highly improbable that he would produce the stolen articles, the search was justified under S. 165 of the Code. There remains the question of sentence. The assault on Inspector Mours was by no means a serious affair. Apparently all that Bhim Singh attempted to do was to seize him by the throat and in so acting he left three scratches on Inspector Mours's face, two on the jaw and one by side of the nose. He then took to his heels and bolted. The offence, no doubt, has been committed, but at the same time it seems to me that a sentence of two years' rigorous imprisonment is quite uncalled for. The police must of course be protected and the offence is a serious one. If the parties had been private persons the sentence would probably have been a small fine. The fact that the assault was made upon a police officer in the execution of his duty increases the gravity of the offence and calls for a severer sentence than a fine, but a sentence of two years' rigorous imprisonment seems to me beyond all bounds. I therefore allow the application to this extent that I reduce the sentence from one of two years' rigorous imprisonment to one of six months' rigorous imprisonment.

V.B./R.K. *Sentence reduced.*

A. I. R. 1919 Allahabad 208

BANERJI AND RAFIQUE, JJ.

Durga Prasad and others—Decree-holders—Appellants.

v.

Shambhu—Judgment-debtor—Respondent.

Letters Patent Appeal No. 168 of 1917, Decided on 30th May 1919, from judgment of Tudball, J., D/- 20th November 1917.

Civil P. C. (1908), S. 60, Proviso Cl. (f)—Office of Mahabrahman or Birtacharji is right to perform personal service.

The office of a Mahabrahman or a Birtacharji is a right to perform personal service and, as such, is exempt from attachment and sale in execution of a decree under Cl. (f) of the proviso to S. 60. [P 208 C 2]

S. N. Sen—for Appellants.

K. N. Katju—for Respondent.

Judgment.—The question raised in this appeal is whether in execution of a simple decree for money what is called Birtacharji can be sold at the instance of

the decree-holder. This Birt, as we understand it, is the office of Mahabrahman who officiates at funerals of Hindus and performs certain ceremonies. The application for the sale of this description of property has been disallowed by the lower appellate Court on the ground that it is a right of personal service within the meaning of Cl. (f) of the proviso to S. 60, Civil P. C., and is therefore exempt from sale in execution of a decree. This decision of the Court below has been affirmed by a learned Judge of this Court. He has referred to the authorities on the subject and we deem it unnecessary to repeat them. The only case which is directly in point is the decision of this Court in *Durga Prasad v. Genda* (1). In that case a learned Judge of this Court held that the Birt Mahabrahmani or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service within the meaning of S. 266 (f), Civil P. C., and as such is not liable to attachment or sale in execution of a decree. S. 60 of the present Civil P. C., corresponds to S. 266 of the old Code. We have not been referred to any case in which this ruling has been dissented from or the correctness of it has been questioned. The policy of the section apparently is to prevent such a compulsory sale as might transfer property of this description to persons disqualified to perform the duties of the office [see the observations of Ranade, J., in *Rajaram v. Ganesh* (2)]. Reference has been made to cases in which it has been held that a Birt Jijmani belonging to a Mahabrahman may be mortgaged by a Mahabrahman to another Mahabrahman, but that analogy cannot apply to the case of compulsory sale in execution of a decree, where a stranger might be the purchaser and be a person who can never perform the duties of a Mahabrahman. We think that the office of a Mahabrahman or a Birtacharji, as it is called in the present instance, is a right to perform personal service and as such is exempt from attachment and sale in execution of a decree under the provisions of S. 60, Cl. (f). We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) [1889] A. W. N. 169.

(2) [1899] 23 Bom. 131.

A. I. R. 1919 Allahabad 209

PIGGOTT AND WALSH, JJ.

Rati Ram—Appellant.

v.

Nadar and another—Respondents.

Second Appeal No. 836 of 1918, Decided on 18th February 1919, against decree of Sub-Judge, Meerut, D/- 10th April 1918.

Limitation Act. (1908), Ss. 6 and 7 and Art. 182—Ss. 6 and 7 are not mutually exclusive—Execution of decree—Death of decree-holder pending execution—Application by son who was manager on his own behalf and on behalf of his minor brother to be brought on record as legal representatives proving infructuous—Application by minor brother made within three years of his attaining majority but three years after previous application held time barred.

A decree absolute was passed on 19th December 1906, in favour of one *M.* On 23rd, September 1909, *M.* put the decree in execution. While the execution proceedings were pending he died. On 29th, September 1910, his son *J.* applied on his own behalf as well as on behalf of his brother *R.* who was a minor, to be brought on the record as legal representatives of the deceased decree-holder and he also asked to be allowed to act as the next friend of *R.* Notices were issued to the judgment-debtor and 10th, December 1910, was fixed for orders. Meanwhile *J.* died and his pleader informed the Court on 24th, November 1910, of this fact and further stated that he had no instructions to proceed further with the application. On 10th December 1910, the Court ordered the original application for execution made by *M.* to be struck off the files of pending cases. Subsequently *R.* having attained majority presented to the Court on 16th July 1917, an application for execution of the decree, which purported to be made in continuation of the original application made by *M.*

Held: (1) that the order of the 10th December 1910, having finally disposed of the application of 29th September 1910, *R.*'s application could not be treated as one asking the Court to take up again the former application as one in respect of which no proper orders had as yet been passed;

[P 209 C 2]

(2) that *R.*'s application having been made more than three years after the application of 29th September 1910, it was time barred, irrespective of the fact that it was made within three years of *R.*'s attaining majority, inasmuch as *J.* as manager of the joint family, could have alone executed the decree and given a valid discharge in respect thereof.

[P 210 C 1, 2]

Sections 6 and 7, are not mutually exclusive; the latter section supplements the former.

[P 210 C 2]

M. L. Agarwala—for Appellant.*S. Mushram*—for Respondents.

Piggott, J.—This second appeal by a decree-holder in an execution case arises out of the following state of facts. One Munshi Lal held a decree absolute for sale on a mortgage passed on 19th December 1906. He took out execution of the

same on 23rd September 1909, but died while the execution proceedings were pending. On 29th September 1910, his sons, Jokhi Prasad and Rati Ram, applied to be brought on the record as his legal representatives. The former was of full age and the latter a minor, the application was in the name of both, and Jokhi Parshad also asked to be allowed to act as the next friend of his minor brother. Notices were issued to the judgment-debtors to appear on 10th December 1910, and show cause why this application should not be granted. In the meantime Jokhi Parshad died; and on 24th, November 1910, the pleader whom he had engaged informed the Court of this fact and stated that he had no instructions to proceed further with the application. The Court took note of this statement, but directed the matter to come up for orders on 10th December 1910, the date fixed.

On that date no one appeared on behalf of the decree holder and the Court ordered the application for execution originally made by Munshi Lal to be struck off the files of pending cases as an application which had proved infructuous. Rati Ram, having in the meantime attained majority, presented to the Court on July 16th, 1917, the application out of which this appeal arises. It is drawn up in the prescribed form for applications for execution of decrees, and the relief sought is set forth in the following words:

"In continuation of the application for execution No. 889 of 1909, it is prayed that it may be perused and formal orders for execution passed."

The lower appellate Court has dismissed the application as time barred, and we have to decide if this order is right. It is contended for the appellant that the present application should be treated as one asking the Court to take up again the application of 29th September 1910, as one in respect of which no proper orders have yet been passed, and to dispose of the same according to law. I should be glad to help the appellant if I could do so without contravening the law, which all Courts are bound to administer; but I cannot see my way to dealing with the matter on this footing. The application presented by Jokhi Parshad asked the Court to do something which it could no longer do when Jokhi Parshad was dead; pending some further application on behalf of the minor Rati

Ram no fresh steps in execution could be taken. Moreover, the order of 10th December 1910, by which Munshi Lal's execution application of 23rd September 1909, was dismissed as infructuous, disposed of the whole matter for the time being. If Jokhi Parshad and Rati Ram had both been on the record as decree-holders at the time of the former's death, some case might have been made out for the appellant by invoking the provisions of O. 22, R. 2, Civil P. C., but as the case actually stood the Court had to wait for a fresh application to bring Rati Ram alone on to the record as legal representative of the deceased decree-holder, Munshi Lal." The case cannot be brought under the provisions of O. 22, R. 3, because nothing in that rule applies to proceedings in execution of a decree, vide O. 22, R. 12. The main question dealt with by the Courts below is whether Rati Ram's application of 16th July 1917, is or is not barred by limitation under the provisions of Art. 182, Sch. 1, Lim. Act 9 of 1908. It was made more than three years after the application of 29th September 1910 by which Jokhi Prashad asked, on behalf of himself and of his minor brother, that they might be permitted to continue the execution proceedings as the legal representative of their deceased father.

On the other hand it was made within three years of Rati Ram's attaining majority. The decision therefore depends on whether time had begun to run as against both Jokhi Parshad and Rati Ram; and this again on the question whether Jokhi Parshad could have given a valid discharge. Under S. 8 of the former Limitation Act 15 of 1877, it was doubted whether the provisions of that section applied at all to joint decree-holders, and there was room for the view that the "discharge" of a judgment-debtor's liability was always given by the order of the Court, and never by the mere act of any decree-holder. In face of some conflict of authority on this point the legislature made it clear that the provisions of S. 7 of the present Lim. Act, 9 of 1908, do apply to joint decree-holders, wherever one of them can act in the matter on his own authority, without the concurrence of the others. In the present case the lower appellate Court was quite justified in presuming, on the state of facts disclosed by this record

that Jokhi Parshad was the manager of a Hindu joint family consisting of himself and his brother. It does not appear that there were any other members of the family, so that Jokhi Parshad was in fact the sole adult male member. He could have sued as manager of the joint family for the recovery of the mortgage debt, if his father had not already obtained a decree for the same; a fortiori he could have taken out execution of the decree and could have given a valid discharge for the same.

I do not think any purpose would be served by my discussing the various cases to which we were referred in the course of argument. All cases, anterior in date to the passing of Act, 9 of 1908, require to be reconsidered in the light of the words then inserted in S. 7 of the said Act. The Madras case on which the lower appellate Court has relied is directly in point and supports the decision arrived at. I do not think there is any case of this Court to the contrary; the learned Munsif relied on a case the facts of which were materially different; in that the period of limitation for a fresh application for execution began to run against decree-holders all of whom were minors. This Court has never held, and I think would be most reluctant to hold, that in all cases in which a fresh period of limitation opens as against a number of decree-holders, members of one and the same family, one of whom happens to be a minor, it is open to the remaining decree-holders to remain quiescent for a period which might well extend to eighteen or twenty years, and then to put forward the said minor, after he had attained majority, to execute the whole decree for their benefit as well as his own. I do not see how we could hold the present application to be within time without in effect committing ourselves to some such proposition as the above. The ingenious argument addressed to us on behalf of the appellant seemed to me to be based, in the last resort, on the contention that the provisions of Ss. 6 and 7, Lim. Act 9 of 1908, must be read so as to be mutually exclusive; I do not think they are mutually exclusive; the latter section supplements the former.

I have carefully considered the question whether there was any application in this matter of which it could be said that

the right to make the same accrued to Rati Ram on 10th December 1910, or on some other date on which he, the minor, was the only person entitled to make such application. It must be noted that the execution Court's order of 10th December 1910 was an ex parte order against the decree-holder. It struck me that Rati Ram might conceivably have presented an application to the execution Court, asking for that ex parte order to be set aside on the ground that he could show good cause for the non-appearance of any person on behalf of the decree-holder on the date above mentioned. The point was not argued out before us and I do not express any opinion as to whether such an application might or might not have succeeded. It is sufficient to point out that the limitation period for such an application would be thirty days, and that in the present case the said thirty days would begin to run from the date on which Rati Ram attained majority. The precise date of his attaining majority is not given in this record, but it is stated to have occurred in the early part of the year 1917. The present applications made on 16th July 1917 cannot have been within thirty days of Rati Ram's attaining majority. It is impossible therefore for us to think of treating this application as one to have the ex parte order of 10th December 1910 set aside. I would therefore dismiss this appeal with costs including fees on the higher scale.

Walsh, J.—I agree. It is not really necessary in this appeal to consider all the authorities which have been discussed. No doubt trouble has arisen in the construction of these two sections Ss. 6 and 7 Lim. Act, by reason of the use of the language in S. 7, "where a discharge can be given." It is no doubt true that when the matter is in the execution Court it is literally true, speaking of it as a matter of procedure, to say that a discharge cannot be given because payment, for example, has to be made in and through the Court or certified by the Court, so that the discharge becomes an order of the Court itself. But I take the very clear view, and I think it removes all the difficulties in this case, that Ss. 6 and 7 are dealing not with procedure but with the legal status of individuals, and the expression "where a discharge can be given" is merely intended in S. 7 to be a definition of a person who in the ordinary

legal language is described as being "able to give a discharge." That is a definition of his legal capacity in relation to the other persons jointly interested, and not a description of his physical powers under the procedure of the execution Court.

By the Court.—The appeal is dismissed with costs, including fees on the higher scale.

v.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 211

BANERJI AND WALLACH JJ.

Qadam Singh—Judgment-debtor—Appellant.

v.

Nathu Singh and another—Decree-holders—Respondents.

Execution Second Appeal No. 171 of 1918, Decided on 16th July 1919, from order of Dist. Judge, Meerut, D/- 27th May 1918.

Civil P. C. (1908), O. 21, R. 2—Instalment decree—Execution of—Payment of instalment out of Court—Judgement-debtor admitting payment—No question of certification arose—Proof of payment by decree-holder was not necessary—Limitation Act (1908), Art. 182.

N obtained a decree against Q for a specific sum of money payable by six annual instalments, with the proviso that in case of default N could realize the whole sum with interest N. applied to execute the decree alleging that the second and third instalments had been paid, but the fourth had not. Q contended that the application was barred by limitation inasmuch as N had not certified payment of the second and third instalments to the Court, and that the fourth instalment had also been paid:

Held: that as Q admitted payment, no question of certifying to the Court of any payment out of Court arose in the circumstances, and that it was not necessary for N to prove such payment. [P 212 C 1]

Uma Shankar Bajpai—for Appellant.

R. Malcomson for *A. E. Ryves*—for Respondents.

Judgment.—This appeal is in our judgment wholly without merit. A decree was passed against the appellant on 13th August 1910 for payment of Rupees 1,446 by six annual instalments of Rupees 241 payable on 1st August of each year. The decree further provided that in the event of default being made in the payment of any of the instalments the decree-holders would be entitled to realise the whole of the decretal amount with interest. The first application for execution was made on 21st February 1912 on the allegation that the first instalment had not been paid. That application was

subsequently withdrawn upon the judgment-debtor paying to the decree-holders the amount of the first instalment. On 4th August 1915 the second application for execution was made on the allegation that the second and third instalments had been paid, but default had been made in the payment of the fourth instalment. The present application for execution was made in 1917. The contention on behalf of the judgment-debtor, the appellant before us, in the Court below was that the application of 4th August 1915 was time barred, and this contention is based on the fact that the payment of the second and third instalments had not been certified to the Court as required by O. 21, R. 2, Civil P. C. In our opinion this contention is without force inasmuch as the judgment-debtor, so far from denying that the second and third instalments had been paid, admitted by a petition in Court the payment of those instalments and only contended that he had paid the fourth instalment also and that no default had been made. As the judgment-debtor admitted payment it was not necessary for the decree-holders to prove that the second and the third instalments had been paid and that default had been made in payment of the fourth instalment only. No question of certifying to the Court of any payment made outside the Court arises in the circumstances of this case. In this view the rulings to which the learned vakil for the appellant has referred have no bearing on the present case. We express no opinion as to whether we agree or not with the decision of this Court in *Chhattar Singh v. Amir Singh* (1), which is one of the cases cited to us. We dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1916] 38 All. 204=32 I. C. 530.

A. I. R. 1919 Allahabad 212

[PIGGOTT AND WALSH, JJ.]

Chidda Singh and another—Plaintiffs—Appellants.

v.

Abdul Majid Khan and another—Defendants—Respondents.

Second Appeal No. 388 of 1917, Decided on 13th December 1918, from the decree of Dist. Judge, Moradabad.

Civil P. C. (1908), S. 144—Ejectment in execution of decree—Decree reversed—Res-

titution partially allowed—Suit to enforce complete restitution is not maintainable.

Plaintiffs were ejected from their holdings in execution of a decree of the Revenue Court. That decree was subsequently reversed and the plaintiffs applied for restitution. The Assistant Collector decided that the plaintiffs could, under the special circumstances of the case, be restored to possession only over part of the area from which they had been ejected. This decision was affirmed by the Commissioner. Plaintiffs then brought a suit to recover possession of the whole of the area from which ejectment had been effected.

Held: that the suit was not maintainable.

[P 213 C 1]

Kailas Nath Kattu—for Appellants.

Mohan Lal Sandal—for Respondents.

Piggott, J.—The plaintiffs in this case are two out of a large number of defendants against whom a suit for ejectment was brought in the Court of an Assistant Collector in respect of certain land described as the tenant holding of all the defendants. The Assistant Collector decreed the suit and his decree was executed by the formal ejectment of all the defendants. His decree was reversed by the Commissioner on appeal, and the Commissioner's order was affirmed by the Board of Revenue upon grounds wholly different from those on which the Commissioner had proceeded. The defendants or some of them, then went to the Assistant Collector and asked to be restored to possession. The decision on this application was much delayed by the institution on the part of the landholders of a very ill advised suit for a declaration in the civil Court which suit was contested up to this Court in second appeal and was dismissed. Finally the Assistant Collector decided that in view of various facts stated in his order, he could only restore those defendants whose application was before him to possession over part of the area from which ejectment had been effected. This order was affirmed by the Commissioner in a carefully considered judgment, which comes nearer to dealing with the merits of the dispute than any other decision pronounced in the course of this complicated litigation. The majority of the tenants against whom the ejectment proceedings were originally taken have by this time abandoned the struggle or come to terms with their land-holders. Twenty-eight of them have sought to carry the matter further by bringing this present suit, in which they claim in substance the relief which the Assistant

Collector and the Commissioner refused to give them. Both the Courts below have found fault with the drafting of the plaint and the form in which the plaintiffs' claim is preferred; but they have dismissed the suit in substance, upon a finding that it is barred by S. 144 (2), Civil P. C. Two of the plaintiffs have brought the matter before this Court in second appeal. I think the Courts below were right. The argument before us has ranged over a wide field; but it seems to me that when one gets down to the essential nature of the present suit there is no real room for doubt. These plaintiffs, as successful appellants, have already been to the Court which passed the decree subsequently reversed on appeal and have received such restitution as that Court considered to be appropriate, or possible in view of the peculiar state of facts. I know of no case in which it has been held that such successful appellants have a further right of suit, upon the plea that the restitution ordered by the Court dealing with the matter in execution was incomplete or (to them) unsatisfactory. I would therefore dismiss this appeal with costs.

Walsh, J.—I agree. I am inclined to think that the argument for the appellants with regard to the applicability of S. 144 is right, that is to say in my opinion the suit which is barred by sub-S. 2 is a suit in the Court in which the relief by application could be obtained, but I do not think it is really necessary to decide this point. In this case an additional reason for not dismissing the suit on that ground alone is that the Revenue Courts have already decided in judgment binding upon the parties that the matter in dispute was one for the civil Courts. Under the circumstances of this particular case the relief claimed is in substance restitution. It appears from the judgment of the Commissioner upon the application for restitution in the Revenue Court that to the extent to which restitution is now claimed, restitution was no longer possible and that having regard to the special circumstances of this case the most that the appellants were entitled to, if anything, was compensation or, in other words, damages for having been wrongfully deprived of their grazing rights by the act of the zamindar in putting the land under cultivation. But such a claim would have

to be made in a civil Court, in answer to which it might be said that the present plaintiffs who are few in number have suffered no damage because the balance of grazing which has been restored to them gives them as much as they formerly enjoyed. But in any case this is not a suit for damages and it is not possible for us to change it into one. The result does, I think, substantial justice, provided that it is understood that this decision proceeds upon the footing that a large number of the tenants or lessees who have not joined in this suit have compromised with the zemindar and cannot therefore share with the present plaintiffs in the grazing rights recovered by them.

By the Court.—We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 213

BANERJI AND PIGGOTT, JJ.

Nur Muhammad—Plaintiff—Applicant.

v.

Maulvi Jamil Ahmad—Defendant—Respondent.

Civil Revn. No. 117 of 1919, Decided on 30th July 1919, from order of Sub. Judge, Allahabad, D/- 4th July 1918.

Civil P. C. (1908), O. 7, R. 10 and O. 33, R. 8—Application for leave to sue as pauper—Court directing application to be returned for presentation to proper Court acts without jurisdiction—High Court can set aside order under S. 115.

An application for leave to sue as a pauper is not a plaint and it only reaches the stage of a plaint when it is granted. Where therefore a Court regarding such application as a plaint directs it to be returned for presentation to the proper Court it acts without jurisdiction and although such an order is not appealable the High Court will in the exercise of its powers of revision interfere and set the order aside. [P 214 C 1, 2]

Vishnu Nath—for Applicant.

S. C. Chaudhri and *A. C. Mittra*—for Opposite Party.

Judgment.—The appellant presented an application in the Court of the Subordinate Judge of Allahabad for leave to sue as a pauper for the recovery of a certain sum of money. The learned Subordinate Judge was of opinion that no cause of action accrued to the plaintiff within the jurisdiction of his Court. He accordingly made an order in the following terms:

"I return the plaint for presentation to the proper Court." From this order

the present appeal has been preferred. A preliminary objection has been taken on behalf of the respondent to the effect that no appeal lies. If the order is in reality an order returning a plaint an appeal does lie under O. 43, R. 1, Civil P. C., but what we have to consider is whether there was any plaint before the Court at the time when it made this order. O. 33 provides the procedure for suits by paupers. R. 2 of the order provides that

"every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and a schedule of any moveable and immovable property belonging to the applicant with the estimated value thereof."

R. 4 provides that

"where the application is in proper form and duly presented the Court may if it thinks fit examine the applicant or his agent."

Under R. 5 the Court shall reject an application for permission to sue as a pauper in the cases specified in that section. R. 6 provides that if the Court sees no reason to reject the application on any of the grounds stated in R. 5, it shall fix a day of which notice shall be given to the opposite party and the Government. R. 8 provides that

"where the application is granted it shall be numbered and registered and shall be deemed the plaint in the suit."

It is thus manifest that what was presented to the Court was not a plaint but an application and it would reach the stage of a plaint when the application was granted and it would then be deemed to be the plaint in the suit. The Court below did not adopt any of the procedure mentioned in the rules to which we have referred above but it proceeded to consider whether it had jurisdiction to entertain the suit and holding that it had no jurisdiction it ordered the application which it regarded as the plaint to be returned. As at that stage there was no plaint before the Court the order must be deemed to be an order returning the application. For this there is no authority in O. 33. If the order be deemed to be a right order returning a plaint an appeal lies from that order but in the present case the order cannot be held to be an order returning a plaint, but it is an order returning an application. Such an order was passed without jurisdiction and should not have been passed. Although, therefore no appeal is allowed from the order which is clearly an improper order we deem it desirable

in the exercise of our powers of revision to treat this appeal as an application for revision and so treating it we think we should be justified in setting aside the order of the Court below and in sending back the case to that Court with directions to adopt the procedure mentioned in O. 33 of the Code. We accordingly order that the application returned by the Court below and filed with the memorandum of appeal in this case be sent to the Court below with directions to deal with it in the manner indicated above. We make no order as to the costs of this appeal.

V.B./R.K. *Application sent back.*

A. I. R. 1919 Allahabad 214

PIGGOTT AND WALSH, JJ.

Lalman and others — Plaintiffs—Appellants.

v.

Chinta Mani — Defendant — Respondent.

Second Appeal No. 437 of 1917, Decided on 12th December 1918, from decree of Dist. Judge, Cawnpore.

(a) Interest Act (1839)—Money received by agent after determination of agency and retained by him—Suit for recovery—Interest cannot be claimed — Contract Act (1872), S. 73, Illus. (n)

Defendant was the agent of the plaintiff. After the determination of his agency and the settlement of accounts the defendant received a sum of money from a customer of the plaintiff in respect of a transaction which he had entered into on behalf of the plaintiff. The latter took criminal proceedings against the defendant in respect of the money but the proceedings were dismissed. As a result of the proceedings however the money was paid into the treasury by an order of the criminal Court. Subsequently the plaintiff sued the defendant for the money with interest:

Held: that the plaintiff was not entitled to interest either under S. 73, Illus. (n), Contract Act, or the Interest Act or under the general law. [P 215 C 1]

(b) Civil P. C. (1908), Ss. 35 and 100—Discretion as to costs decided arbitrarily in appeal—Second appeal to High Court will lie on question of costs.

A second appeal as to costs will lie from an appellate decree where the lower Court has exercised its discretion as to costs arbitrarily and not according to general principles. [P 216 C 1]

As a rule questions of costs are in the discretion of the trial Court and everybody who is dissatisfied with some order or part of some order as to costs cannot come to the High Court in appeal in order to set aside or modify the order of the lower appellate Court. But where an important question of principle has been decided, the High Court is bound to look into the decision and see whether it is arbitrary or based upon a bad principle. [P 216 C 1]

Peary Lal Banerji—for Appellants.

Kailas Nath Katju and *Tej Bahadur Sapru*—for Respondent.

Judgment.—This is a second appeal from a decree granted by the District Judge in favour of the plaintiffs, who were principals, against their agent for a sum of Rs. 3,396-10-9, depriving the plaintiffs of any sum for interest on the amounts due and depriving them of their costs of the suit. The appeal is brought against those decisions, namely, with regard to the interest and with regard to the costs. There is a cross-appeal by which the defendant objects to the amount of the decree. With regard to the interest the decision appears to us to be right. Upon the facts found, on some date in 1912, the agency of the defendant had been determined and the accounts between the plaintiffs and the defendant had been settled, so that the defendant had nothing to claim from the plaintiffs. He received a sum of money paid to him by customers of the plaintiffs in respect of a transaction which he had entered into on behalf of the plaintiffs, although his employment had come to an end. That sum of money appears to have been received by him at the time in perfect good faith. The plaintiffs on hearing about it became suspicious and took criminal proceedings against him, apparently for misappropriation, which proceedings were dismissed. The sum of money therefore remained in his hands as money received for the use of the plaintiffs subject to any deduction which the defendant was entitled to make therefrom. In fact, as the result of the criminal proceedings it was eventually paid into the treasury by an order of the criminal Court in April 1913. The only grounds upon which interest can be claimed upon such a sum of money when the liability for the sum is established are to be found, either in S. 73, Contract Act, Illus. (n), or in the Interest Act, 32 of 1839. Illus. (n) deals with an express contract by one person to pay a sum of money to another on a day specified and provides that whatever loss the obligee can show by failure to pay he can only recover interest from the due date up to the date of payment.

That illustration clearly deals with the breach of an express contract, and the view taken in Pollock's Indian Contract Act—and we agree with it—is that it does

not intend to abolish the ordinary rule or to supersede the Act of 1889. This case clearly does not come within that illustration. Act 32 of 1839 provides that interest shall be payable upon all debts or sums certain, payable at a certain time or otherwise, if such debts or sums be payable by virtue of some written instrument, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment.

It is not suggested that the case comes within that provision. That Act goes on to provide that interest shall be payable in all cases in which it is now payable by law. The question therefore remains, whether by the general or common law interest is payable in respect of such a transaction as this. The rule of English Common law was that interest was not payable on ordinary debts unless by agreement or by mercantile usage, nor could damages be given for nonpayment of mere money debts. The ground on which the first Court decided looks like an attempt to find some mercantile usage between the parties. It was said that there was an express entry of a charge of interest at the rate of ten annas in the plaintiffs' account-book. If that meant that the defendant had seen the entry, and accepted it, and that the parties in the course of business had settled their accounts on that footing, the ground would have been sufficient, but there is no finding to that effect. It is unlikely to say the least of it, that any agent would accept such a position because, as has been pointed out to us in the course of argument, he has the right to retain in his hands money of the principal to reimburse himself any expenses legitimately incurred and to deduct his remuneration, and such an arrangement would have to be carried out, if at all, by taking an account almost daily to find what precise sum was due from the agent to the principal on which the interest would be payable, a clumsy arrangement which businessmen are not likely to enter into deliberately. We do not think that under the circumstances of this case the mere entry in the plaintiffs' book, although seen by the defendant and even that is not found as a fact, is sufficient to create

a mercantile usage entitling the plaintiffs to interest.

With regard to costs the respondent sought to argue that there was no right of appeal on the question of costs alone under S. 100 of the Code, because S. 35 had vested the discretion with regard to costs in the trial Court, and a second appeal can only lie where the Court has decided contrary to law or some usage having the force of law. We have already said all that has to be said upon this point in a recent case decided by ourselves: *Radhey Shiam v. Bihari Lal* (1). One older authority of this Court was cited to us, *Daulat Ram v. Durga Prasad* (2). Although that decision may be justified on the ground that the Bench in that case was overruling an appellate Court for interfering with the first Court on insufficient grounds, we agree with the head-note which lays down the general principle that an appeal as to costs will lie from an appellate decree (which means a second appeal) when the Court has exercised its discretion as to costs arbitrarily and not according to general principles. As a rule questions of costs are, as the law provides, in the discretion of the trial Court, and it must not be supposed that anybody who is dissatisfied with some order or part of some order as to costs can come to this Court in appeal in order to set aside or modify the order of the lower appellate Court. But where an important question of principle has been decided, we are bound to look into the decision and see whether it is arbitrary or based upon sound principle. To put the matter shortly, the learned Judge of the lower appellate Court has confined himself entirely to matters antecedent to the suit itself. And although there are authorities, to which we need not refer in detail, which justify the depriving of successful parties of costs on some matter connected with the litigation antecedent to the suit, the matter upon which the learned Judge has acted seems to us far removed from the actual dispute which he had to decide in this case. He has in fact punished the plaintiffs for criminal proceedings which they brought against the defendant and which the learned Judge considered hasty and unjustified, but a time was reached when

those proceedings came to an end and a period of some 18 months elapsed before the plaintiffs were finally driven to assert their claim to the money in dispute by suing in Court. Throughout that time it was open to the defendant at any moment to admit his liability to the extent to which he considered himself liable and immediately the suit was lodged he could have filed admission of the amount of liability which he recognized, subject to the cross-claim which he set up, instead of doing that, he defended the suit in its entirety; he fought it with determination and appealed from the decision against him claiming among other things that the suit ought to have been dismissed. And the Judge himself says that he has no doubt that the defendant has taken up this entirely antagonistic position mainly by reason of his anger at the criminal proceedings. He further holds the plaintiffs to have been unreasonable in presuming the defendant's dishonesty and on that ground deprives them of their costs. The plaintiffs' conduct can in no sense be said to have led to or rendered necessary the litigation. Litigation in this suit was rendered necessary by the failure of the defendant to recognise his liability and by his strenuous efforts to establish his defence. This is no ground for depriving the plaintiffs of their costs. The proper order to make under the circumstances is that the decree of the lower appellate Court decreeing the plaintiffs Rupees 3,396.10-9 will stand. The plaintiffs must have the costs of the suit in the proportion of Rs. 3,388 to Rs. 621. The defendant must pay the costs of the appeal to the lower appellate Court and the appellants will have the costs of this appeal in the proportion of Rs 610 to Rs. 254, including in this court fees on the higher scale. There are cross-objections by the defendant-respondent against the amount which has been found due but these raise merely questions of fact. No question of principle is involved and they must be dismissed with costs.

V.B./R.K. *Appeal partly accepted.*

(1) [1918] 40 All. 558=48 I. C. 478.

(2) [1893] 15 All. 332.

A. I. R. 1919 Allahabad 217 (1)

KNOX, J.

Dori Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 53 of 1919, Decided on 12th March 1919, against order of Sess. Judge, Bareilly, D/- 14th January 1919.

Penal Code (1860), Ss. 415 and 420—Mortgagee bringing mortgaged land to sale and purchasing it—Trees on land transferred in interim by mortgagor—Mortgagee knowing this, selling trees without disclosing circumstances—Mortgagee held to be guilty under S. 420.

D was the mortgagee of a plot of land on which stood some trees. He brought the land to sale under his mortgage and purchased it, but in the interim the mortgagor had transferred the trees to another person. *D*, knowing this, sold the trees to *S* without disclosing the circumstances:

Held: that *D*'s act amounted to a dishonest concealment of facts within the meaning of the explanation to S. 415, and that he was therefore guilty of the offence of cheating under S. 420 of the Code. [P 217 C 1, 2]

Iqbal Ahmad—for Applicant.*Asst. Government Advocate*—for the Crown.

Judgment.—*Dori Lal* has been found guilty of an offence under S. 420, I. P. C., and sentenced to imprisonment for six months and to a fine of Rs. 150. It is contended before me that on the facts found *Dori Lal* is not guilty of the offence of which he has been convicted. It is also contended that in any case the sentence is severe. *Dori Lal* is found by the learned Sessions Judge to have sold certain trees to one *Sukhan* as being his property and to have received Rs. 150 as part of the sale price. *Sukhan* went on to cut down the trees, was resisted and found that the trees belonged to certain other persons. *Sukhan* then went back to *Dori Lal* to complain, but *Dori Lal* put him off and eventually drove him away with abuse and would not return the money paid. The contention is that *Dori Lal*'s acts did not amount to cheating as defined in S. 415, I. P. C., and in support I am referred to the case of *Emperor v. Bishan Das* (1). In the present case the trees which *Dori Lal* sold to *Sukhan* stand on land in respect of which *Dori Lal* held a mortgage. He brought the land to sale under the mortgage and purchased it before the sale of the trees by him to *Sukhan*, but in the

(1) [1905] 27 All. 561.

interim the mortgagor had given the trees in suit to other persons as compensation for certain trees which the mortgagor had wrongfully cut down. The learned Sessions Judge pointed out that *Sukhan* would not have paid anything for the trees if he had known of these circumstances and the same answer was given me on behalf of *Dori Lal* by the learned *vakil* who appears for him in this Court, but he contends that *Dori Lal* was not bound to say anything about the matter, and particularly so as *Sukhan* never asked him about his ownership or right over the trees in dispute. The learned Judge infers from the conduct of *Dori Lal*, when *Sukhan* made the complaint to him, that *Dori Lal* had been convicted of dishonestly concealing the facts as contained in the Explanation to S. 415, I. P. C. I agree with the Sessions Judge and dismiss the application. I am not prepared to hold that the sentence errs on the ground of severity. The applicant must surrender to his bail to serve the remaining term of his imprisonment.

V.B./R.K. *Application dismissed.***A. I. R. 1919 Allahabad 217 (2)**

KNOX, AG. C. J. AND BANERJI, J.

Mathra Prasad—Defendant—Appellant.

v.

Gokal Chand and another—Plaintiffs—Respondents.

Letters Patent Appeal No. 40 of 1918, Decided on 22nd May 1919, from judgment of Rafique, J., D/- 13th November 1917.

Evidence Act (1872), S. 115—Agreement to hold house as tenant by execution of *sarkhat*—Suit for ejectment—Tenant is estopped from denying plaintiffs' title.

M held a house as the tenant of two brothers *D* and *L*. The house was attached in execution of a decree obtained against *D* alone. *L* during the pendency of execution proceedings, applied for, and obtained a preliminary decree for partition of the house, but before the decree was made the house was sold by auction and was purchased by *R* the predecessor-in-title of the plaintiff. After the sale, *M* executed a *sarkhat* agreement to hold the house as a tenant in favour of *R* and agreed to vacate the house, if required by *R* to do so, on receiving a month's notice. He however refused to vacate the house when served with notice and the present suit was brought to eject him therefrom. He resisted the suit on the ground that the plaintiff was not the sole owner of the premises, and therefore had no title to sue for his ejectment:

Held: that in the presence of the *sarkhat* executed by *M* in which he agreed to vacate the house if required to do so by *R* he was estopped

from denying the plaintiff's title to get the house vacated. [P 218 C 1,2]

D. C. Banerji—for Appellant.

Uma Shankar Bajpai—for Respondents.

Judgment.—The suit out of which this appeal arises was one for ejectment of a tenant from a house and for arrears of rent. The house belonged to two brothers Debi Prasad and Lalta Prasad. In execution of a decree obtained by one Incha Ram against Debi Prasad, he caused the whole house to be attached as the property of Debi Prasad. During the pendency of the attachment a suit was brought by Lalta Prasad for partition of the house, and he made Debi Prasad and Incha Ram parties to that suit. He obtained a preliminary decree from the High Court for partition subject to certain conditions, but before the decree of the High Court was made the property was sold by auction and was purchased by Ram Chand, the predecessor-in-title of the plaintiffs. We may mention that Mathra Prasad, appellant, was a tenant in the house having been put into it by Debi Prasad and Lalta Prasad. After the auction-sale, however on 4th May 1914 Mathra Prasad executed a sarkhat (that is, an agreement to hold the house as tenant) in favour of Ram Chand, and in that document he distinctly stated that he took the house from Ram Chand on a rent of Rs. 3 per mensem, and that if Ram Chand wanted to have the house vacated, he (Mathra Prasad) would vacate it on receipt of a month's notice. The present suit was brought to eject Mathra Prasad from the house, after serving him with the requisite notice, and for arrears of rent. He resisted the suit on the ground that the house belonged not only to Debi Prasad in whose shoes Ram Chand stood but also to Lalta Prasad and that therefore the plaintiffs were not entitled to eject him from the house. This contention was overruled by the Courts below and the learned Judge of this Court has upheld the decree of the lower appellate Court.

We think that the plaintiffs' claim has been rightly decreed. Mathra Prasad having executed a sarkhat in favour of the plaintiffs' predecessor Ram Chand and having agreed to hold the house from him and to vacate it on receipt of notice from him to do so, he is estopped from

denying the plaintiffs' title to get the house vacated. This case seems to be similar to that of a tenant who has taken a lease from one of two co-owners of certain property and agreed to surrender the property if called upon to do so by the person who granted the lease. In such a case it is not open to the tenant to dispute his landlord's title. We were referred to the case of *Lal Mahomed v. Kallanus* (1). The circumstances of that case were different. Furthermore it was considered by the Calcutta High Court in the later case of *Ketu Das v. Surendra Nath Sinha* (2) and the view taken in it does not seem to have been accepted. In our opinion apart from the fact that there was nothing on the record to show that the partition decree made in favour of Lalta Prasad had become final, the defendant is precluded now from disputing the plaintiff's title. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1885] 11 Cal. 519.

(2) [1903] 7. C. W. N. 596.

A. I. R. 1919 Allahabad 218

RICHARDS, C. J. AND BANERJI, J.

Mt. Badrunnissa Bibi and others—
Plaintiffs—Appellants.

v.

Shanker Lal — Defendant — Respondent.

First Appeal No. 154 of 1917, Decided on 30th January 1919, from decision of Sub-Judge, Allahabad, D/- 12th December 1916.

Bengal N. W. P. and Assam Civil Courts Act (1887), S. 21 — Mortgage suit below Rs. 5,000 but decree over Rs. 5,000—Appeal lies to District Judge.

In a mortgage suit the value of which was below Rs. 5,000 a decree was passed under O. 34, R. 6, Civil P. C., for a sum exceeding Rs. 5,000:

Held: that an appeal against the decree lay to the District Judge, and not to the High Court.

[P 219 C 1]

Tej Bahadur Sapru—for Appellants.

O'Connor, Baldev Ram and Damodar Das—for Respondent.

Judgment.—A preliminary objection is taken to the hearing of this appeal. The original suit was a suit on foot of a mortgage and the value of the suit was a sum below Rs. 5,000. The usual mortgage decree was made absolute, and eventually it appears that the mortgaged property was sold but proved insufficient to discharge the amount. Thereupon an application was made under O. 34, R. 6,

corresponding with old S. 90, T. P. Act, for a personal decree which was granted by the Subordinate Judge. It is against the decree of the Subordinate Judge so made that the present appeal is filed. The preliminary objection is that the appeal should have been presented to the District Judge and not to the High Court. S. 21, Act 12 of 1887 (Civil Courts Act) provides that an appeal should lie from a decree of the Subordinate Judge to the District Judge where the value of the original suit was under Rs. 5,000. The appellant seems to have thought that because a fresh decree was granted under O. 34, R. 6, and the amount of that decree exceeded Rs. 5,000, this Court was the proper Court to which to present the appeal. We think this view was erroneous. We accordingly allow the preliminary objection and direct that the memorandum of appeal be returned to the appellant for presentation in the proper Court. The respondents must have their costs of this appeal, including fees on the higher scale. The memorandum of appeal may be returned as soon as possible.

V.B./R.K. Memo. of appeal returned.

A. I. R. 1919 Allahabad 219

LINDSAY, J.

Abdul Ghani—Defendant—Appellant.

v.

Din Dayal—Plaintiff—Respondent.

Civil Revn. No. 107 of 1918, Decided on 1st April 1919, against order of Munsif, Bijnor, D/- 4th January 1917.

Civil P. C. (1908), Sch. 2, Para. 5—Authority to appoint fresh arbitrator in place of one refusing to act arises only when conditions in para. 5 have been fulfilled.

Where an arbitrator refuses to act, the Court is in certain circumstances vested with jurisdiction to appoint a fresh arbitrator. But this authority to appoint does not arise until the necessary conditions precedent laid down in para. 5, Sch. 2, have been fulfilled [P 220 C 1]

Where on the refusal of an arbitrator to act the Court appointed a fresh arbitrator on the application of the plaintiff, and it appeared that no notice had been issued to the defendant asking him to join in making an appointment :

Held : that the Court had acted with material irregularity and that its order should be set aside. [P 220 C 1]

S. M. Sulaiman—for Appellant.

J. N. Misra—for Respondent.

Judgment.—This is an application in revision directed against an order of the Munsif of Bijnor passed in the course of a suit in which the parties originally went to arbitration. It appears that after

the first arbitrator had been appointed and after he had been called upon to enter upon his duties, he informed the Court that he was not willing to act and returned the papers which had been sent to him. The date on which the papers were returned to the Court with this intimation was 8th December 1916. The Munsif thereupon directed that the parties should be given notice of the refusal of the arbitrator to act. On 12th December 1916 it is made to appear that an application was made on behalf of the plaintiff direct to the Court asking for the appointment of another arbitrator. The defendant was present on that occasion and from the order sheet it appears that the parties could not come to any agreement in the matter of nominating a fresh arbitrator. In these circumstances the Munsif recorded an order saying that he considered one Babu Kuar Sen to be a suitable person to act as arbitrator and made an order appointing him accordingly. The defendant took objection on 18th December 1916 to his appointment and took his stand on the provisions of Sch. 2, Civil P. C., para. 5. It was pointed out that no written notice had been served upon him by the plaintiff as required by that paragraph, that the appointment was made before the expiry of seven clear days, and that the defendant had no opportunity of showing cause against the appointment of Babu Kuar Sen.

The Munsif passed no order on this application. He merely ordered it to be filed with the record and to be put up on the date fixed. In the meantime Babu Kuar Sen had issued notices to the parties to appear before him and produce their evidence on a certain date. Before the date for taking evidence, the defendant presented a petition to the arbitrator reiterating the objection he had already made in the Court of the Munsif; the result was that the defendant, refusing to recognize the appointment of Babu Kuar Sen, declined to attend the inquiry and to produce any evidence. The plaintiff's evidence was taken and an ex parte award was drawn up which was sent to the Court. Notice then issued to the defendant to show cause why the award should not be made a rule of Court. Again the defendant took objection to the appointment and pleaded that in the circumstances no decree should be made on

the *ex parte* award. The Court overruled the objection and after expressing an opinion that the arbitrator had not been guilty of any misconduct gave a decree in terms of the award.

It is argued here that the proceedings of the Munsif from the time the first arbitrator refused to act have been without jurisdiction and that even if they were not without jurisdiction they were at least tainted with illegality or material irregularity. On the other hand, it is argued that this is not a case for revision. It is pleaded that the provisions of the law regarding the appointment of the second arbitrator were substantially, if not literally, complied with. It is said that the Court had jurisdiction to appoint a second arbitrator and that if there were any irregularities they were not material irregularities which this Court is called upon to correct. It is not to be doubted that in certain circumstances the Court is vested with jurisdiction to appoint a fresh arbitrator. But this authority to appoint does not arise unless the necessary conditions precedent have been fulfilled and it is clear to me that inasmuch as the plaintiff failed in this case to serve the notice required by para. 5, sub para. 1, and to apply to the Court in the manner laid down in para. 5, sub-para. 2, the Court had no authority to proceed to appoint Babu Kuar Sen as an arbitrator. Even if it could be assumed in the Munsif's favour that he was acting within his jurisdiction, it is certain that he acted at least with irregularity which in the circumstances was material, for the result of his action was that an arbitrator was thrust upon the defendant against his will and without his being given any opportunity of showing cause against the appointment. I am satisfied therefore that the applicant has succeeded in making out the case sought to be established in revision. The proceedings were most irregular and must be set aside. The order is therefore that the application is allowed, the decree of the Munsif's Court is set aside and the case is sent back for disposal in accordance with law. The petitioner is entitled to his costs in this Court, including fees on the higher scale.

V.B./R.K.

*Case sent back.***A. I. R. 1919 Allahabad 220**

PIGGOTT, J.

Sarju and another—Convicts—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 742 of 1918, Decided on 7th December 1918, from order of Dist. Magistrate, Cawnpore.

(a) Criminal P. C. (1898), Ss. 107 and 117 Persons against whom joint proceedings are taken under S. 117 are not on their joint trial for same offence within Evidence Act (1872), S. 30.

Persons against whom proceedings are being jointly taken under S. 117 in one and the same inquiry cannot be said to be on their joint trial for the same offence within the meaning of S. 30, Evidence Act. [P 221 C 1]

(b) Criminal P. C. (1898), S. 117—Scope of words "or otherwise" in S. 117 (3)—Joint enquiry under S. 117—Statements made by some accused incriminating others are admissible against latter.

Statements made by one of several persons against whom a joint inquiry is being made under S. 117 which are in the nature of confessions and contain incriminating matter against the other accused, are admissible against the latter.

The effect of the words "or otherwise" in sub-S. (3), S. 117, is to render admissible any evidence which would be relevant if the accused person or persons were being tried on a charge of being habitual offenders. [P 221 C 2]

A. P. Dube—for Applicants.

R. Malcomson—for the Crown.

Judgment.—These are applications of two persons, Sarju and Lallu, who have been required to furnish security to be of good behaviour for a period of one year. They were brought before a Magistrate along with four other persons, the case for the prosecution being that these six men were individually habitual thieves and house-breakers and also were associated together in the matter under inquiry. The judgment of the trying Magistrate and the appellate judgment of the learned District Magistrate show that the police had beyond question very substantial reasons for the action taken by them. The six men had been arrested together under circumstances of grave suspicion and the circumstances of their arrest constituted in themselves evidence of association. As against four out of the six men there was overwhelming evidence of their being habitual criminals as alleged by the prosecution. Such being the case, the evidence of habitual association on the part of Lallu and Sarju with these criminals of inferior social status would constitute in itself very strong

ground for an inference that such association could only be based upon community in crime. As regards Sarju there was, over and above the evidence as to the arrest, certain documentary evidence as to which I agree with both the Courts below that it was suspicious in a high degree. The contents of the documents and the circumstances under which they came into the hands of the police were such as in my opinion very definitely to warrant the inference that Sarju was associated with habitual criminals as their accomplice and partner in crime. The case against Lallu differs from that against Sarju mainly because he is not implicated in any of these documents. In this connexion a question of law has been raised, for the consideration of which no doubt this application in revision was admitted by the learned Judge of this Court before whom it was presented. It appears that after the arrest of the accused persons two of them, namely, Chheda and Narain, made statements which amounted to confessions of the actual commission of a particular offence and which contained incriminating matter regarding the relations of Sarju and Lallu with the other persons associated with them in this inquiry. The question is whether anything contained in those statements could lawfully be taken into consideration by the Court in coming to a conclusion as regards the propriety of binding over Sarju and Lallu to be of good behaviour.

I am satisfied that the provisions of S. 30, Evidence Act, considered by themselves, do not justify the admission in evidence of these statements. It is true that the word "offence" is not defined in the Evidence Act and that the subsequent definition of that word in the General Clauses Act, cannot be treated as governing its use in the Evidence Act, a Statute already in force when the General Clauses Act was passed. At the same time, having regard to the way in which the word "offence" is defined elsewhere I do not think that persons against whom proceedings are being jointly taken under S. 117, Criminal P. C., in one and the same inquiry can be said to be on their joint trial for the same offence, within the meaning of S. 30, Evidence Act. I do not think however that this consideration altogether disposes of the point now before the Court. The enquiry was

one under S. 117, Criminal P. C. The prosecution had to make good the assertion that the six persons before the Court had been associated together in the matter under inquiry and moreover as I have already pointed out the fact of association with the other four persons was a strong point against Lallu and Sarju. Under these circumstances I think the prosecution were entitled to put the statements in evidence which two of the persons then before the Court had made before a responsible Magistrate and which if true established the existence of such association as the prosecution alleged. I do not mean to say that the statements by Chheda and Narain could have been taken in evidence against Lallu and Sarju in the absence of all other evidence of association, or could have been accepted as proof of criminal association in the absence of any other evidence. In the present case the Court had before it *prima facie* evidence of criminal association in the circumstances under which the arrest of the six men had been effected. The principle underlying the provisions of S. 30, Evidence Act, obviously is that when a statement can be proved against one of two accused persons jointly on their trial, it is very difficult, if not practically impossible, to require the Court to exclude that statement altogether from its mind when it comes to consider the case against the other accused.

Such a consideration seems to me to apply *a fortiori* to proceedings in an inquiry under S. 117, Criminal P. C., when once the prosecution has made out a reasonable case for dealing with two or more persons in the same inquiry under sub-Cl. 4 of the said section. The effect of the words "or otherwise" is to render admissible any evidence which would be relevant if the accused person or persons were being tried on a charge of being habitual offenders. Thus the words of the section are wide enough to admit of these statements being put in evidence and of their being taken into consideration by the Court when coming to its conclusion as to whether the case of habitual association for the purpose of committing such offences as theft and house breaking was made out against each of the persons before the Court. On a consideration of the record as a whole I see no reason to doubt that the order in

question was justified as against Lallu, as it certainly was, in my opinion, in respect of Sarju. I dismiss both these applications.

V.B./R.K. *Applications dismissed.*

***A. I. R. 1919 Allahabad 222 (1)**

LINDSAY, J.

Kishori Lal—Plaintiff—Applicant.

v.

Kalean Khan and another—Defendants—Opposite Parties.

Civil Revn. No. 2 of 1918, Decided on 26th March 1919, against order of Dist. Judge, Saharanpur, D/- 15th September 1917.

U. P. Honorary Munsif's Act (1886), S. 8—Cases transferred from Court of Small Causes to Bench of Honorary Munsifs ceases to retain character of Small Cause Court suit—Civil P. C. (1908), S. 24 (4).

Section 8, U. P. Honorary Munsifs Act of 1896 declares S. 24, sub-S. 4, Civil P. C., to be inapplicable to cases transferred from a Small Causes Court to a Court of Honorary Munsifs. Therefore a case transferred from a Court of Small Causes to a Bench of Honorary Munsifs ceases to retain the character of a Small Cause Court suit and a decree passed by the Munsifs in the suit becomes appealable. [P 222 C 2]

Nihal Chand—for Applicant.

M. L. Agarwala—for Opposite Parties.

Judgment.—The applicant here, who was the plaintiff in the Court of first instance, has been unfortunate in the trial of his case. The case was instituted in the Court of Small Causes and was under the orders of the District Judge, transferred for disposal to a Bench of Honorary Munsifs. The whole procedure of the Munsifs, after the case came to their cognizance, is a chapter of errors resulting apparently in considerable hardship to the plaintiff. The plaintiff took certain measures in order to secure a proper order from the Bench and he succeeded so far that the Bench of Munsifs, acting under the directions of the Judge of the Small Cause Court, passed what purported to be an amended decree in favour of the plaintiff. One of the defendants then went in appeal to the District Judge who has held that the Munsifs had no authority to amend the decree and consequently he has set aside their order. The plaintiff now attacks the order of the learned District Judge, on the ground that he had no jurisdiction to entertain the appeal which was preferred before him. The learned counsel for the appellant has, I think, been under some misapprehension regarding the state of

the law. While it is true that there is no appeal from a decree of the Small Cause Court, it is provided by S. 8, Honorary Munsifs Act, Act 2 of 1896, that when a case has been transferred from a Court of Small Causes to a Bench of Honorary Munsifs, it ceases to retain the character of a Small Cause Court suit and a decree passed by the Munsifs in that suit becomes appealable. This is obvious from a reference to the provisions of S. 24, sub-S. (4), Civil P. C. This sub-section is declared by S. 8 Honorary Munsifs Act, not to apply to cases transferred from a Small Cause Court to a Court of Honorary Munsifs. It was therefore competent for the defendants to appeal to the District Judge and it is not possible to argue that the learned District Judge exercised jurisdiction which was not vested in him; nor moreover is it possible to say that the learned Judge has acted with material irregularity or illegality.

For these reasons this application for revision of the Judge's order must fail. The application is dismissed with costs accordingly. The costs in this Court will include fees on the higher scale.

V.B./R.K. *Application dismissed.*

***A. I. R. 1919 Allahabad 222 (2)**

BANERJI AND RAFIQUE, JJ.

Niadar Singh—Decree-holder—Appellant.

v.

Sabit Khan and others—Judgment-debtors—Respondents.

Letters Patent Appeal No. 15 of 1918, Decided on 6th June 1919, against judgment of Knox, J., D/- 23rd November 1917.

* Civil P.C. (1908), S. 60—House of agriculturist, appurtenant to his agricultural holding is not liable to sale in execution of decree.

Having regard to the provisions of S. 60, the house of an agriculturist, which is appurtenant to his agricultural holding, is not liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist.

[P 223 C 1]

S. N. Sen—for Appellant.

S. A. Haider—for Respondents.

Judgment.—The question in this case is whether the house of an agriculturist, which has been found to be appurtenant to his agricultural holding, is liable to sale in execution of a decree obtained upon a mortgage of the house made by the agriculturist. The appellant relies on

the decision of the Full Bench in *Bhola Nath v. Mt. Kishori* (1). In that case the view seems to have been taken that the house of an agriculturist which was mortgaged by him was liable to sale in execution of a decree, provided that it did not appertain to his agricultural holding. As in this case it has been found that the house appertains to the agricultural holding of the respondents, it is not liable to sale having regard to the provisions of S. 60, Civil P. C. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1911] 24 All. 25=11 I. C. 646.

A. I. R. 1919 Allahabad 223 (1)

RICHARDS, C. J. AND BANERJI, J.

Kunwar Bahadur and others—Defendants—Appellants.

v.

Madho Prasad and others—Plaintiffs—Respondents.

First Appeal No. 178 of 1916, Decided on 19th December 1918, from decree of Addl. Sub-Judge, Cawnpore.

Hindu Law—Succession—Ancestral and self-acquired property—Son living separately from father is entitled to inherit along with other sons in absence of partition.

The mere fact that a Hindu son ceases to live with his father, does not, in the absence of a partition, disentitle him from sharing in the joint ancestral or self-acquired property left by his father along with the other sons of the latter who lived jointly with him. [P 223 C 2]

Nehal Chand and Baldeo Ram Dabe—for Appellants.

Tej Bahaur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit for possession. It appears that a man of the name of Asharfi Lal married no less than four times. He had issue by all four wives and sons by three. When Asharfi Lal died, the defendants are alleged to have gone into possession of one-third of the property left by Asharfi. The plaintiffs thereupon instituted the present suit. Their claim is certainly somewhat peculiar. It is alleged that the plaintiffs lived jointly with their father and that the defendants were separated from their father. But it is clear that even if this were so, the plaintiffs could not succeed in their present suit if we assume that the property belonged to Asharfi. The facts as found by the Court below seem to be as follows: Asharfi having married a number of times, the defendants (who were the sons of the first wife) left the house. They had got

a small property from Mt. Bakhta Kunwar, who was the widow of their grandfather's brother. But it must clearly be borne in mind that this property was property which they did not acquire from Asharfi. The defendants not only ceased to reside in their father's house, but they maintained themselves upon the property which they had acquired in the manner just mentioned. They even went so far as to get this property put into a separate mahal. There is no finding that Asharfi ever separated from his sons, the defendants, in the sense that there was a partition between them, or that the defendants got their share of the ancestral property and thereupon severed themselves from the family. It seems to us that if the property was ancestral property in the hands of Asharfi, then it would remain joint ancestral property, and the defendants upon the death of Asharfi would be entitled on partition to their share of it. If however we accept the finding of the Court below that the property was self-acquired property of Asharfi, upon his death all his sons including the defendants would be entitled and the mere fact that some of these sons continued to live in his house joint in food with him would not deprive the sons who were living away from him of their share in his estate. We think that the decree of the Court below cannot be supported. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 223 (2)

RICHARDS, C. J. AND BANERJI, J.

Gaddar—Appellant.

v.

Kalla and others—Respondents.

Second Appeal No. 1911 of 1916, Decided on 11th April 1919, against decision of Sub-Judge, Muttra, D/- 11th May 1916.

(a) **Easements Act (1882), S. 13—Partition of land—Well allotted to one party—Other party has no easement of necessity in respect of well.**

The plaintiff and defendant jointly owned a plot of land on which there was a well. Upon partition that portion of the land on which the well was situate fell to the plaintiff and the well was allotted to him. The defendant however continued to use the well and the plaintiff brought the present suit for an injunction restraining him from doing so:

Held: that as the use of the well was not necessary for the enjoyment of defendant's share of the land, he had no easement of necessity in respect of it within the meaning of S. 13, Easements Act. [P 224 C 1]

(b) **Easements Act (1882), S. 15—Easement of necessity defined.**

An easement of necessity is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. [P 224 C 2]

Narain Prasad Asthana—for Appellant.

Brajnath Vyas—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiff claimed an injunction restraining the defendants from using a certain well. The facts are quite clear. The well was enjoyed by both the parties prior to a recent partition. When the partition was made that part of the land in which the well is fell into the plaintiff's Mahal and according to the partition the well was given to the plaintiff. The words in the partition order were that the Pucca well shall be transferred along with the land. It seems quite clear therefore that the well and all rights in the well were allotted to the plaintiff to whose share the land was allotted. The lower appellate Court seems to have thought that the defendants might have an "easement of necessity." S. 13, Easement Act, provides amongst other things that:

"Where a partition is made of the joint property of several persons, if an easement over the share of one of them is necessary for enjoying the share of another of them the latter shall be entitled to such easement."

Clause (f):

"If such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such an easement."

It is clear that the clauses referred to apply to "easements of necessity." The use of the well cannot possibly be said to be necessary for the enjoyment of the defendants' share on partition. No doubt it might be convenient for them to have such enjoyment but it is not necessary. The worst that can happen is that the defendants will be obliged to dig a new well for themselves. It seems quite clear that the partition officer rightly or wrongly intended to allot the well to the plaintiff. In the case of *Sukhdei v. Kidarnath* (1)

a Bench of this Court laid down what an easement of necessity is. It is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. If the partition authorities wished to reserve any right to the defendants upon the partition, that ought to have been done in the partition proceedings. In the absence of any such provision it is clear that the plaintiff is the absolute owner of the well free from any right on the part of the defendants. We allow the appeal, set aside the decree of both the Courts below and decree the plaintiff's claim for an injunction. We, under the circumstances, do not award any damages but the plaintiff-appellant will have his costs in all Courts, including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 224

BANERJI AND RAFIQUE, JJ.

Mt. Rukmina Kuar and others—Appellants.

v.

Sheo Dat Rai and another—Respondents.

Letters Patent Appeal No. 38 of 1917, Decided on 2nd June 1919, from judgment of Knox, J., D/- 14th March 1917.

Limitation Act (1908), Art. 182—Decree passed in 1894 providing that plaintiff on payment of certain sum "in any year in the month of Jeth" was to recover possession of certain property—Money deposited in June 1915—Application for execution of decree made in June 1916—Decree held not governed by Art. 182—Right to execute decree arose on payment and plaintiff could execute decree within three years of payment.

A decree directed that upon payment by the plaintiff of a certain sum of money "in any year in the month of Jeth" he was to receive possession of certain property. The decree was passed on 22nd January 1894, the money was deposited on 15th June 1915 and an application to execute the decree was made on 29th June 1916. The defendant objected that the application was barred by limitation:

Held: (1) that the decree, being indefinite as to the date on which payment was to be made, was incapable of execution on the date on which it was passed and was therefore not governed as to the period of limitation for its execution by Art. 182, Sch. 1, Lim. Act;

(2) that the right to execute the decree could not arise unless payment was made and that the plaintiff was therefore entitled to execute the decree within three years of the date when he made the payment. [P 225 C 1]

K. K. Varma—for Appellants.

M. L. Agarwala—for Respondents.

(1) [1911] 33 All. 467=9 I. C. 628.

Judgment.—We agree with the view taken by the learned Judge of this Court. The decree was one for delivery of possession passed on 22nd January 1894 on the basis of an arbitration award. It provided that the plaintiffs-decree-holders were to get possession upon payment of Rs. 750 to the defendants in any year in the month of Jeth. The money was deposited on 15th June 1915 and the application for execution was made on 29th June 1916. It was contended that the application was time barred. The learned Judge of this Court has held that the application was not barred by limitation. Art. 182, Lim. Act, applies to cases in which the decree is capable of execution on the date on which it was passed, except in the circumstances mentioned in some of the special clauses to the Article. The decree in this case was not capable of execution on the date on which it was passed. Therefore if Art. 181 is applicable to the present case limitation would run from the date on which the right to apply accrued. It is clear that the right to apply did not accrue until Rs. 750 was paid and the right to pay the money was given to the decree-holders in the month of Jeth of any year. The decree is undoubtedly indefinite as to the date on which payment was to be made, but it certainly did not direct that payment was to be made in the month of Jeth following the date of the decree. The Court executing the decree had to give effect to the decree as it stood and could not go behind it. Taking the decree as it stands, the decree-holders had the right to pay Rs. 750 at any time they liked in the month of Jeth of any year. Their right to execute the decree could not arise unless the payment was made. Therefore they were entitled to execute the decree within three years of 15th June 1915 when they made the payment. We dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 225**

RICHARDS, C.J. AND BANERJI, J.

Mt. Suraj Kuar—Plaintiff—Appellant.

v.

Chet Ram and others—Defendants—Respondents.

First Appeal No. 278 of 1916, Decided on 15th January 1919.

(a) **Agra Tenancy Act (1901), S. 142—Suit by tenant (mortgagor) to challenge validity of distraint—Mortgage held satisfied—Suit by mortgagee for declaration that mortgage subsists is not res judicata—Civil P. C. (1908), S. 11.**

In a suit brought by a tenant mortgagor under S. 142 to challenge the validity of a distraint against the landlord mortgagee it was held that the mortgage had been satisfied. Thereupon the mortgagee brought a suit in the civil Court for a declaration that the mortgage still subsisted.

Held: that the subsequent suit was not res judicata. [P 225 C 2]

(b) **Agra Tenancy Act (1901), S. 199—S. 199 applies to suit against and not by alleged tenant.**

Section 199 applies to the case of a suit brought against a person whom the plaintiff alleges to be his tenant. It does not apply to a case where the suit is brought by the alleged tenant against the alleged landlord. [P 226 C 1]

Panna Lal—for Appellant.

Hamilton and N. C. Vaish—for Respondents.

Judgment.—The facts connected with the suit out of which this appeal arises are as follows: The defendants made a usufructuary mortgage in favour of the plaintiff of their zamindari. For the convenience of the parties the mortgagee made a letting of the mortgaged property to the defendants. Thus the defendants became tenants at a rent to their own mortgagee. Later on the plaintiff distrained for the rent alleged to be due under the letting. The defendants alleged that the distraint was illegal because (as they alleged) the mortgage had been discharged and that therefore the tenancy had come to an end. They instituted a suit under S. 142, Agra Tenancy Act, challenging the validity of the distraint on these grounds. That suit resulted in a finding by the Revenue Court that the mortgage had been discharged. Thereupon the plaintiff instituted the present suit alleging that her mukhtaram, in collusion with the defendants, had fraudulently endorsed payment on the bond and returned it to the mortgagors and also alleging that the mortgage was in fact unsatisfied and undischarged and that the full amount was due thereon. The plaintiff claims possession of the mortgaged property. The Court below, without taking evidence, held that the decision of the Revenue Court in the suit instituted by the defendants under S. 142, Agra Tenancy Act, operates as res judicata. Prima facie the decision of the Revenue Court would not operate as res judicata in the civil Court, because the

Revenue Court was not competent to try the present suit. The defendants however seek to call to their aid the provisions of S. 199, Agra Tenancy Act. That section provides that if in any suit or application filed in a Revenue Court against a person alleged to be the plaintiff's tenant, the defendant pleads that he is not a tenant but has a proprietary right in the land, the Revenue Court may either require the defendant to institute a suit in the civil Court for the determination of the question of title, or it may determine such question of title itself. The section goes on to provide that if the Revenue Court determines to decide the question of title itself it shall follow the procedure laid down in the Code of Civil Procedure for trial of suits, and notwithstanding anything contained in S. 193 of the Act all the provisions of the Code should apply to the trial of such question. It is contended that a question of proprietary title did arise and that the decision of the Revenue Court must be deemed to be a decision of a civil Court. We may assume for the purpose of argument that when a question of proprietary title is tried by the Revenue Court in exercise of its powers under the section in a case brought by a person against another alleging the latter to be a tenant and the defendant pleads that he has proprietary title and is not a tenant, the decision of the Revenue Court may operate in the same way as if the decision had been the decision of a civil Court. But it seems to us that the section does not apply in the present case. The section applies to the case of a suit brought against a person whom the plaintiff alleges to be his tenant.

In the present case the suit was under S. 142, Tenancy Act, and was brought by the alleged tenant against the alleged landlord. Furthermore it seems to us that there was no question of proprietary title involved in the previous suit. It was common cause that the defendants were the proprietors. Mt. Suraj Kunwar never claimed to be the proprietor. She only claimed to be mortgagee under a usufructuary mortgage, and the question between the parties was not who had "proprietary title", but whether or not the mortgage had been discharged and satisfied. We must allow the appeal, set aside the decree of the Court below and remand the case to that

Court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants must have their costs of this appeal, including fees on the higher scale. Other costs will abide the result.

V.B./R.K.

Appeal allowed.

*** A. I. R. 1919 Allahabad 226**

RAFIQUE AND PIGGOTT, JJ.

Makrand Singh and another—Appellants.

v.

Kallu Singh—Respondent.

First Appeal from Order No. 155 of 1918, Decided on 4th April 1919, from order of Dist. Judge, Farrukhabad, D/- 8th August 1918.

*** Limitation Act (1908), Art. 66—Mortgage bond providing for repayment of money after seven years and payment of interest yearly—Mortgagee to recover principal either on default of payment of interest or after expiry of term—Default made in 1903—Suit by mortgagee in 1914—On sale proceeds proving insufficient—Application for personal decree—Art. 66 held to apply and suit held to be within time—Civil P. C. (1908), O. 34, R. 6.**

A mortgage bond, dated September 1902, provided for the repayment of the money advanced upon it after the lapse of seven years and the payment of interest yearly, leaving it optional with the mortgagee to recover the principal either on default of payment of interest, or after the expiry of the term. Default was made in the payment of interest in 1903. The mortgagee sued in 1914 and obtained a decree against the mortgaged property, but the amount realized by the sale of that property in execution being insufficient to cover the amount of the decree, he applied, under O. 34, R. 6, for a personal decree, when it was objected that the remedy by way of a personal decree was barred by limitation.

Held: that Art. 66, applied to the case and that the suit, having been brought within six years from the expiry of the term given in the bond, was within time. [P 227 C 1]

*Gulzari Lal—*for Appellants.

*A. S. Osborne—*for Respondent.

Judgment.—The only point in the appeal before us is whether the remedy sought by the decree-holder under O. 34, R. 6, Civil P. C., is barred by limitation. The learned Judge of the lower appellate Court has applied Art. 66, Lim. Act. The bond provided that the money advanced upon it was to be paid after the lapse of seven years and the interest was to be paid yearly. The mortgagee was given the option of suing either on default in the payment of interest or after the expiry of the term. The mortgagee sued after the expiry of the term and obtained a decree

against the mortgaged property. It was sold in execution of the decree and fetched only Rs. 25. The amount of the decree was Rs. 1,466-13-0. The decree-holder then applied under O. 34, R. 6, for a personal decree. The judgment-debtors pleaded limitation on the allegation that the cause of action accrued to the mortgagee after one year of the execution of the bond when the first default in payment of interest was made. The trial Court yielded to this objection and rejected the prayer of the decree-holder for a personal decree against the legal representatives of the mortgagor. On appeal by the decree-holder the learned District Judge, disagreeing with the first Court, reversed its order and remanded the case for trial. The appeal before us is from the remand order of the learned District Judge, dated 8th August 1918, by which he held that the remedy of the mortgagee for obtaining a personal decree under O. 34, R. 6, was not barred by limitation. It is contended on behalf of the appellants, the judgment-debtors, that the cause of action accrued to the mortgagee for a personal decree on the first default in the payment of interest, that is, some time in September 1903. As the bond is a registered bond, the mortgagee could claim six years from that date. Had he asked for a personal decree within six years of September 1903 he would have been within time. He brought the suit on the mortgage some time in 1914 and by that time the personal remedy had become barred.

We are unable to agree with the learned counsel for the appellants in view of a decision of this Court reported as *Gaya Prasad v. Sher Ali* (1). The bond in that case contained almost the same terms as the bond in the present case. The learned Judges held that the bond was a single bond and the article of the Limitation Act applicable was Art. 66. They calculated the period from the expiry of the term given in the bond. In the present case the term expired in September 1909, the mortgagee instituted his suit in 1914 and his suit was therefore within time. The appeal fails and is dismissed with costs, including in this Court fees on the higher scale. The stay order is discharged.

V.B./R.K.

Appeal dismissed.

(1) [1917] 39 I. C. 574.

A. I. R. 1919 Allahabad 227

RICHARDS, C. J. AND BANERJI, J.

Kamla Devi—Plaintiff—Appellant.

v.

Gur Dayal and *others*—Defendants—Respondents.

Second Appeal No. 150 of 1917, Decided on 9th January 1919, from decree of Dist. Judge, Aligarh.

Civil P. C (1908), O. 7, R. 6—Suit for redemption of mortgage alleged to have been executed between 60 years before suit—Court declining to consider acknowledgments relied on by plaintiff on ground that they were not specially pleaded in plaint and dismissed suit—It was not necessary for plaintiffs specially to plead that acknowledgments saved limitation—Burden of proving that mortgage was not given within 60 years was on mortgagee—Evidence Act (1872), S. 106.

In a suit to redeem a mortgage it was alleged that the mortgage was executed within 60 years before suit. The trial Court dismissed the suit on the ground that the plaintiff had failed to prove the allegation and declined to consider certain acknowledgments on which the plaintiff relied on the grounds that they had not been specially pleaded in the plaint:

Held: (1) that the plaintiff having pleaded that the mortgage was within limitation it was not necessary for him to plead that the acknowledgments saved the operation of limitation:

(2) that the mortgagee was the person in whose possession the mortgage deed would naturally be and that the evidence as to the exact date of the mortgage was therefore a matter within his peculiar knowledge, so that the burden of proving that the acknowledgments were not given within 60 years of the mortgage lay upon him.

[P 228 C 1]

Peary Lal Banerji—for Appellant.

Panna Lal—for Respondents.

Judgment.—This appeal arises out of a suit to redeem a mortgage. In the plaint it was alleged that the mortgage was executed in or about the year 1856. Various pleas were taken and the Court of first instance dismissed the suit. The lower appellate Court upheld the decision of the Court of first instance upon the ground that the plaintiff was the wife of a Kanungo and that the transfer of the mortgagor's interest was really for the benefit of the Kanungo, and that it was against public policy that the Kanungo should become the transferee of the mortgagor's interest. This Court on appeal held that this was not a correct view of the law and remanded the case to the lower appellate Court, the Court of first instance having decided the other issues. On remand the lower appellate Court, whilst dismissing the suit for redemption, granted the plaintiff a decree for

the amount which had been paid for the transfer of the mortgagor's interest against the vendors. The Court decided against the plaintiff so far as the claim for redemption, went upon the ground of limitation. The Court held that the plaintiff had failed to prove that the mortgage was executed within 60 years of the institution of the suit and declined to consider certain acknowledgments on which the plaintiff relied upon the ground that if the plaintiff sought to bring herself outside limitation it was necessary for her to plead in the plaint that the acknowledgments had been given within limitation.

We think that the view taken by the Court below was incorrect. The plaintiff had pleaded the mortgage within limitation. It was therefore not necessary for the plaintiff to plead that the acknowledgments saved the operation of limitation. We think the Court below was bound to consider the acknowledgments which were referred to and proved to the satisfaction of the first Court. These acknowledgments are of a remarkably clear description. They consist of entries in the *wajibularz* commencing from the year 1866 and going on to the year 1900. Even in the year 1913 the defendant described himself as mortgagee. In the *wajibularz* the description of the land is given, the amount of the mortgage, the names of the mortgagors and the mortgagees respectively. It is said that the plaintiff was bound to have shown that these acknowledgments were given sixty years of the date of the mortgage; and that as the plaintiff had failed to prove the exact date of the mortgage, the acknowledgments are of no avail. It must be remembered that unless the mortgage was as old as the year 1806, the acknowledgments were perfectly good. It must also be remembered that the party in whose possession the mortgage deed would naturally be, would be the defendant who was the mortgagees' representative. The evidence therefore as to the exact date of the mortgage was a matter within the peculiar knowledge of the defendant and not of a plaintiff. We think that the acknowledgments, assuming them to have been given in time, were sufficient acknowledgments of the subsistence of the mortgage, and we think under the circumstances of this case that we ought to hold that acknowledgments

were given before the expiration of 60 years from the date of the mortgage. We therefore think that the plaintiff ought to have got a decree for redemption. There is some doubt as to whether the land now claimed is identical with the land mortgaged. Before finally deciding the appeal we think that we must refer an issue on this point. We accordingly refer the following issue to the lower appellate Court, namely—Is the land claimed the land mortgaged, and if not, what is the land mortgaged?

The parties will be entitled to adduce evidence relevant to this issue. On return of the finding the usual ten days will be allowed for filing objections. The case will be put up on return of the finding. The issue may be sent down as soon as possible.

V.B./R.K.

Issue remitted.

A. I. R. 1919 Allahabad 228

RICHARDS, C. J. AND BANERJI, J.

George Summerly Carmichael Cole—
Defendant—Appellant.

v.

Catherine Ann Harper — Plaintiff—
Respondent.

First Appeal No. 157 of 1917, "Decided on 10th March 1919, from decree of Sub-Judge, Shahajhanpur, D/- 1st February 1917.

Civil P. C. (1908), S. 13—Suit by plaintiff in England—Service of summons accepted by solicitor and appearance put in by him on behalf of defendants—Judgment given on plaintiff's evidence—Judgment held to be on merits.

Plaintiff brought a suit against defendant in the High Court of Justice in England. Defendant was called away from England and was unable to appear and defend the suit in London, but service of the writ of summons was accepted by a solicitor who entered appearance on behalf of the defendant. The action was tried by a Judge and special jury and on the evidence of the plaintiff judgment was given against the defendant. Plaintiff brought the present suit on the basis of that judgment:

Held: that the judgment was a judgment given on the merits within the meaning of that expression in S. 13 and was conclusive between the parties. [P 229 C 2]

W. Wallach and Shamnath Mushran—
for Appellant.

B. E. O'Connor and Lakshmi Narain—
for Respondent.

Judgment.—This appeal arises out of a suit which was brought on foot of a judgment of the High Court of Justice in England. It appears that the plaintiff brought an action in England against the

defendant for personal injuries alleged to have been caused by the negligence of the defendant in the management of his motor car. It appears that the action was tried in England in the year 1913 before Darling, J., and a Special Jury, when judgment was given for £250 and costs. In the present suit, which was based upon that judgment the defendant was examined as a witness and deposed to the fact that he was called away from England rather suddenly after the outbreak of war and that consequently he was unable to appear and defend the suit in London. It is accordingly contended on his behalf that the judgment was not a judgment "on the merits" within the meaning of S. 13, Civil P. C. That section provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties except in certain cases one of which is where the judgment has not been given "on the merits." It is quite clear that a solicitor accepted service of the writ of summons and entered appearance on behalf of the defendant and that the case came regularly before a Judge and jury.

We will assume in the defendant's favour that his absence was due to his being required to return at very short notice to India. The only question which we have to decide is whether the judgment was given "on the merits." In support of the defendant's contention that it was not on the merits, the case of *Kaymer v. Viswanatham Reddi* (1) has been cited. In that case the defendant was sued in England and interrogatories were administered to him on behalf of the plaintiff. The defendant refused or neglected to answer the interrogatories, whereupon an application was made on behalf of the plaintiff under O. 31, R. 21, of the English Judicature Act which provides that where a defendant fails to comply with an order to answer interrogatories he shall be liable to have his defence struck out and to be placed in the same position as if he had not defended. The application of the plaintiff was granted and judgment was entered against the defendant under the provisions of this rule. Their Lordships of the Privy Council held that under the

circumstances of that case the judgment had not been given "on the merits." In the present case the circumstances we need hardly say, are quite different. In the case quoted the judgment followed as a penalty upon the defendant not complying with the order of the Court and the facts and circumstances of the case were never gone into at all. In the present case the evidence of the plaintiff herself, or some other evidence, had to be given before the jury could find a verdict in her favour. We think that the judgment in the present case was a judgment given "on the merits" within the meaning of that expression in S. 13, Civil P. C., and consequently the judgment was conclusive between the parties. The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1919 Allahabad 229

RICHARDS, C. J. AND BENERJI, J.

Irshad Hussain and others—Plaintiffs—Appellants.

v.

Gopi Nath—Defendant—Respondent.

First Appeal No. 62 of 1917, Decided on 29th January 1919, from decision of Sub-Judge, Agra, D/- 29th November 1916.

*** Provincial Insolvency Act (1907), S. 22—Attachment by receiver—Objection dismissed—Suit for declaration is barred as res judicata.**

A share in a certain house was attached by a receiver in insolvency as belonging to the insolvent. The plaintiff objected to the attachment under S. 22 on the ground that the share attached belonged to him. The objection was dismissed and the order was upheld in appeal. Plaintiff then brought a suit for a declaration that the attached share belonged to him :

Held : that the suit was barred by the principle of res judicata. [P 230 C 2]

Abdul Raoof and S. M. Sulaiman—for Appellants.

Surendra Nath Sen, Mohan Lal Sandal and Naraina Prasad—for Respondent.

Judgment.—This appeal arises under the following circumstances : A man of the name of Wilayat Ali was adjudicated an insolvent. A share in certain house property was attached by the receiver as being the property of the insolvent. This property was claimed by the appellants who were the son and nephew of the insolvent. These persons filed an application in the insolvency matter under

(1) A. I. R. 1916 P. C. 121=88 I. J. C. 683=10 Mad. 112=44 I. A. 6(P.C.).

S. 22, Insolvency Act, which provides that :

" if the insolvent, or any creditor or any other person, is aggrieved by the act or decision of the receiver he may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of. "

The act apparently complained of in the insolvency matter was the attachment of the property. No doubt the investigation as to whether or not the receiver was justified in attaching the property involved the investigation of the title to the share attached. The appellants in this Court produced their evidence, with the result that the insolvency Court refused to reverse or modify the act of the receiver in attaching the property ; in other words, dismissed the application. An appeal was filed from the decision of the insolvency Court which resulted in the dismissal of the appeal on the merits. Thereupon the plaintiffs instituted the present suit which seeks a declaration of their title to the same property as was attached in the insolvency matter. The Court below has dismissed the plaintiffs' suit on the ground that the decision of the insolvency Court and the appellate Court in the appeal from the insolvency decision operates as *res judicata*. If we had to consider the matter in the absence of authority, we doubt very much whether the order of the insolvency Court and the Court of appeal from that order can operate as *res judicata*. The provisions as to *res judicata* are contained in S. 11, Civil P. C., which provides that :

" No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. "

We may point out that there was no previous suit between the parties to this suit. There was only the petition of objection to the attachment and the order passed on that petition. No doubt the question which is involved in the present suit namely, the title to the property, was investigated in the insolvency matter but there is strong ground for the argument that the rule of *res judicata* is limited to the provisions of S. 11, Civil P. C. In the case

of *Gokul Mandar v. Pudmanund Singh* (1) their Lordships of the Privy Council say as follows :

" They will further observe that the essence of a Code is to be exhaustive on the matter in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. "

Where a decree-holder attaches property as being the property of his judgment-debtor and a third party objects to the property being attached, the third party can object to the attachment. If the objection is ruled against him he is entitled to bring a suit, provided that he brings it within the time expressly allowed by law, but the right to bring the suit is expressly given by the Code itself. It would certainly seem that in many cases it would be highly objectionable that an insolvency Court should in a summary manner dispose of property or issues involving the title to the property. If an insolvency Court has jurisdiction to finally try the right to property, it should as a general rule require the parties to file statements in the nature of pleadings, issues should be duly framed and the case tried in the manner in which an ordinary civil suit is tried. On the other hand it certainly seems open to grave objection that a claimant to property alleged to belong to an insolvent (not claiming as a creditor) should be entitled to have an investigation of his alleged title in the insolvency Court with a right of appeal, and that he should then be again entitled to reopen the entire question in an independent suit. The consideration of this case indicates the necessity for amendment of the Insolvency Act. We have thought it right to say so much because an important question of law seems to be involved in the consideration of this case. We find however that in the case of *Pitaram v. Jhujhar Singh* (2) a Bench of this Court decided, under circumstances which in principle cannot be distinguished from the present case, that a decision of the insolvency Court operates as *res judicata*. We are bound to follow this decision or refer the present appeal to a larger Bench for reconsideration of the question involved. If we thought that any injustice had been done in the pre-

(1) [1902] 29 Cal. 707=29 I. A. 196=8 Sar. 323 (P. C.).

(2) [1916] 33 I. C. 798.

sent case we should not hesitate to adopt this course. We find however that there really was a complete trial of the plaintiffs' title in the insolvency case. The plaintiff's title to the property was based upon an alleged oral will which the wife of the insolvent is alleged to have made a few days before her death and not very long before the application for the order of insolvency. The Court absolutely disbelieved that the alleged oral will was ever made and came to the conclusion upon the materials it had before it that an arbitration award based upon this alleged oral will was a clumsy attempt to defeat the creditors of the insolvent. The title set up by the claimant was highly improbable and suspicious. Under these circumstances we do not think that this case is a fit one to refer to a larger Bench. We accordingly dismiss the appeal with costs, including in this court-fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 231**

RICHARDS, C. J. AND RAFIQUE, J.

Nanak Chand and another—Defendants—Appellants.

v.

Chameli Kunwar—Plaintiff—Respondent.

Second Appeal No. 996 of 1918, Decided on 21st February 1919, from decree of the first Addl. Judge. Aligarh.

Mortgage—Mortgaged Property leased to mortgagor—Mortgagee obtaining decree for rent—Sale of mortgaged property in execution of decree on mortgage—Purchaser held entitled only to right and interests of mortgagor—Mortgagee held not estopped from enforcing his right—Evidence Act (1872), S. 115.

A mortgagee obtained a decree for rent against his mortgagor to whom the mortgaged property had been leased and in execution of that decree brought the mortgaged property to sale. In a subsequent suit for realization of the mortgage money the auction-purchaser claimed that he had purchased the property free from the mortgage. It was found that at the time of his purchase he was aware of the existence of the mortgage:

Held, (1) that the purchaser was entitled only to the right and interest of the mortgagor which alone could be sold in execution of the decree for rent; (2) that the purchaser being aware at the time of his purchase of the existence of the mortgage, the mortgagee was not estopped from enforcing his rights under the mortgage. [P 231 C 1]

Panna Lal—for Appellant.

Judgment.—This appeal arises out of a suit which was brought to realise the

amount of a mortgage. The facts appear to be that after the mortgage (which was usufructuary in form) was made the mortgagee made a letting of the property which consisted of houses to the mortgagor. Rent fell into arrear; the mortgagee brought a suit for the rent, obtained a decree and put up the houses for sale. They were purchased by the appellant here. When the present suit was instituted, it was contended on behalf of the appellant that he must be taken to have purchased the entire interest in the houses and that the plaintiff was not at liberty as against him to set up the mortgage. The finding of the Court below is that the defendant, who was the auction purchaser, knew of the existence of the mortgage and purchased the property at a price which was far less than the value of the houses had they been free of incumbrances. It is contended on the authority of *Muhammad Hamid-ud-din v. Shib Sahai* (1) and certain other rulings that the appellant here must be deemed to have purchased the houses free from all encumbrances. We think that there is no force in this contention having regard to the finding of the Court below. It is admitted that if the simple money decree had been obtained by some person other than the mortgagee it would only be the interest of the judgment-debtor that could be sold. The interest of the judgment-debtor was merely his equity of redemption and his tenancy if the latter had any value. It is said however that because the decree-holder happened to be the mortgagee, the mortgagee, after the sale is estopped from setting up his mortgage. If any question of estoppel arises it must be under the provisions of S. 115, Evidence Act, which provides that:

"when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

We may concede for the purpose of argument that the omission to state at the time of the attachment of the property that the decree-holder had a mortgage thereon amounted to an "omission" within the meaning of this section, but it was necessary before deciding in favour of the defendant to find that by that "omission" the decree-holder had inten-

(1) [1899] 21 All. 309.

tionally caused the auction-purchaser to believe that there was no mortgage on the property and had caused him to act upon that belief. In the present case the findings show that the auction-purchaser did not believe that there was no mortgage. On the contrary the finding is that he knew that there was a mortgage. The purchaser did not act on the belief that there was no mortgage. The finding is that he did not pay the full value of the houses. We think on the findings of fact arrived at the decree of the Court below was quite correct. We dismiss the appeal.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 232**

RAFIQUE AND WALSH, JJ.

Dwarka Singh — Appellant.

v.

Ram Nand Upadhyaya and others—Respondents.

Second Appeal No. 419 of 1917, Decided on 15th April 1919, against decision of Addl. Munsif, Jaunpur, D/- 20th July 1916.

(a) Evidence Act (1872), Ss. 65, 66 and 90—Documents more than thirty years old and necessary in evidence not produced—Secondary evidence is admissible without notice to party or his pleader to produce it.

A defendant who is in possession of a document more than thirty years old which he knows will be required in evidence, is bound to produce it. If he fails to do so, the plaintiff is entitled to give secondary evidence of the contents of the document without giving any notice to the defendant or to his pleader calling upon him to produce the original, such notice being excused by S. 66 (a) [P 234 C 1]

In a suit for redemption the defendant mortgagee was in possession of the deed of mortgage which was more than thirty years old, but he failed to produce it at the trial of the suit and the plaintiff in order to prove the mortgage produced a certified copy of the deed.

Held: that the certified copy was admissible in evidence under S. 65, and that S. 90 of the Act did not limit or confine the application of that section to cases where the original document was actually produced in Court. [P 234 C 1]

(b) Evidence Act (1872), Ss. 90 and 114—Document thirty years old not available and only certified copy produced—Presumption as to due execution and attestation may be made by Court.

The presumption permitted by S. 90 of the due execution and attestation of a document which is shown to be 30 years old may be made by the Court where that document cannot be produced but a certified copy of it is forthcoming. [P 234 C 1]

*Radha Kant Malaviya—*for Appellant.*S. M. Sulaiman and Braj Nath Vayas—*for Respondents.

Rafique, J. — The two appeals Nos. 419 and 420 are connected and arise out of a suit brought by the plaintiffs-respondents for redemption of a mortgage. They stated in their plaint that the mortgage was executed by one Mt. Phulbasi on 3rd of June 1876 in favour of Bhairon Singh, the predecessor-in-interest of the defendants. The mortgage was in lieu of Rs. 300 and was with possession. Mt. Phulbasi died leaving her surviving a son called Ram Sundar. He executed a sale deed in respect of the mortgaged property in favour of the plaintiffs. The latter served a notice on the defendants asking for redemption on 27th April 1915 alleging that the mortgage had been satisfied by the appropriation of the timber on the property. The defendants declined to make over possession of the mortgaged property and on 18th June 1915 the suit out of which the two appeals have arisen was instituted by them for redemption. In addition to the recovery of the property without payment, the plaintiffs asked for Rs. 215 damages for mesne profits. The defendants resisted the claim on various pleas. They denied the mortgage of 3rd June 1876 as also the allegation that Ram Sundar was the son of Mt. Phulbasi. They stated that the property in suit was their own and in any case they had been in adverse possession for more than twelve years.

The original mortgage deed was not produced in the case. The plaintiffs filed a certified copy of the deed which was admitted by the Court. The Court held that as the original mortgage-deed must have been made over to Bhairon Singh, the mortgagee, and must have come after his death, in the possession of the defendants, they should have produced it and as they had failed to produce the original document, the plaintiffs were entitled to give secondary evidence by producing a certified copy of the original deed. The Court further held that the presumption under S. 90, Evidence Act, could be raised in respect of a certified copy filed on behalf of the plaintiffs. The revenue entries from 1864 up to the present day were also filed in the case which show that the owner of the property was the husband of Mt. Phulbasi and after his death her name was entered as owner and subsequently as mortgagor. After her death the name of her son Ram Sundar was substituted and he was shown as the

mortgagor. The names of Bhairon Singh and the defendants were shown in the revenue papers ever since 1876 as those of mortgagees. Taking the said entries into consideration and the presumption under S. 90, Evidence Act, the learned Munsif held the mortgage of 1876 proved.

The other pleas in defence were also disallowed. The allegation of the plaintiffs with regard to the satisfaction of the mortgage was disbelieved. A decree was passed in favour of the plaintiffs-respondents for redemption of the property on the payment of Rs. 300. Under the said decree the plaintiffs were to bear their own costs as also the costs of the defendants. Both parties appealed to the lower Court: the plaintiffs with regard to costs and the defendants with regard to the decree for redemption. The lower appellate Court dismissed the appeal of the defendants maintaining the decree for redemption and accepted the appeal of the plaintiffs partially making each party to bear his own costs. The defendants preferred two appeals to this Court, namely, Nos. 419 and 420. The two appeals came up before me on 20th January 1919, when three objections were urged on behalf of the appellants against the decree of the lower Court, namely, first, that the mortgage of 1876 is not proved, secondly, that the defendants have proved their adverse possession for more than 12 years prior to the institution of the suit; and thirdly, that no tender having been made by the plaintiffs their claim is not maintainable. In my judgment of 20th January 1919 I have given reasons for the rejection of the second and third objections. The first objection relating to the proof of the mortgage of 1876 raised a point of law about which I found conflict of authority in this Court and therefore I referred the case to a larger Bench. The only point now before us is whether the mortgage which the plaintiffs seek to redeem has been proved according to law. The contention for the defendants-appellants is that the plaintiffs have only filed a certified copy of the mortgage of 3rd June 1876 and no presumption under S. 90 can be raised in respect of it.

The language of the section clearly shows that the section applies only to the case of an original document, and not to a certified copy. On the other hand the argument for the plaintiffs-respond-

ents is that the use by the legislature of the words: "When any document is produced" does not limit the operation of the section to cases in which the document is actually produced in Court. Secondary evidence of an ancient document is therefore admissible without proof of the execution of the original when a case is made out under S. 65, Evidence Act. In support of his argument the learned counsel for the respondents relies upon the following cases: *Khetter Chunder Mookerjee v. Khetter Pal Sreeterutno* (1), *Ishri Prasad Singh v. Lallijas Kunwar* (2) and *Ponnam-balath Parapraavan v. Karoth Sankaran Nair* (3). The reply for the appellants is that these cases were wrongly decided and that the provisions of S. 90 were not carefully considered. Reliance is placed by the appellants on a passage in the judgment of a Bench of this Court in First Appeal No. 13 of 1913, decided on 6th July 1914. The passage in question is as follows:

"Section 90, Evidence Act, only applies when the document is produced and the presumptions therein mentioned are presumptions in favour of a document which is actually produced. Even then the Court is not bound to presume although it is entitled to do so if it thinks fit. There is no presumption in favour of a document, the copy of which is produced in evidence."

On a reference to the facts of that case it appears that no question of presumption under S. 90 arose, inasmuch as the loss of the original mortgage deed had not been satisfactorily proved. The observations about the application of S. 90 to a certified copy were merely an expression of opinion which need not have been made as far as the decision of that case was concerned. The cases relied upon by the plaintiffs-respondents were not brought to the notice of the learned Judges who decided it. I agree with Wilson, J., in his observations in the case of *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* (1). The language of S. 90 does not limit or confine the application of the section to cases where the original document is actually produced in Court. This Court also took the same view in the case of *Ishri Prasad Singh v. Lallijas Kunwar* (2). On the construction of the section contended for by the appellants it would open a door to fraud by enabling a mortgagee to withhold

(1) [1880] 5 Cal. 886.

(2) [1900] 22 All. 294.

(3) [1911] 12 I. C. 453.

the mortgage deed and thus defeat the claim for redemption. I think that the lower Courts were right in applying S. 90 to the certified copy of the mortgage of 1876 filed by the plaintiffs.

There is one more point to be considered in connexion with the objection of the appellants. The learned counsel has contended that no notice for the production of the original was served upon his clients and omission to give such a notice is fatal to the case of the plaintiffs, and that they were not entitled to give secondary evidence unless and until they had served a notice upon the defendants to produce the original. I do not think that there is any force in this contention. According to S. 66, Evidence Act, secondary evidence of the contents of the documents referred to in S. 65, Cl. (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is (or to his attorney or pleader) such notice to produce it as is prescribed by law, except in the six cases mentioned in the section. One of the exceptions is: "When from the nature of the case, the adverse party must know that he will be required to produce it." In the present case the defendants must have known that the mortgage deed in their possession would be required in evidence in the case. They failed to produce it. The plaintiffs were therefore entitled to give secondary evidence of the deed without giving any notice to the defendants or their pleader, calling upon them to produce the original. I would therefore hold that there is no force in the appeal and that the appeal should fail.

Walsh, J.—On the question of law referred to this Court by my brother I agree that the presumption permitted by S. 90 of the due execution and attestation of a document which is shown to be 30 years old, may be made by the Court where that document cannot be produced but a certified copy of it is forthcoming. In this case the defendant, the suit being one for redemption, was an adverse party who must have known that he would be required to produce the original of the mortgage. Notice to produce the document, therefore was excused by S. 66 (a). The loss of the original or its wilful non-production by the defendant, it matters

not which, therefore made a certified copy admissible under S. 65. That certified copy was admissible to prove the original. In other words, to prove what the original, if produced, would have proved. I feel bound to say that the language of S. 90 seems to me to permit by its express terms the presumption which has been applied in this case only to an original which is produced, and I find myself unable to accept the explanation which is given of the word "produce" as not meaning production in Court, because, in my opinion, the section is only dealing with the function of a Court and no other sort of production in a section of the Evidence Act could be contemplated, and the argument for the appellant in this case is that the document is not produced. I prefer while agreeing entirely with the result, to base my opinion upon a well-known rule of equity by which the Courts have always acted by analogy to a statute which is not expressly applicable. We have to apply the rule of equity and good conscience where an express provision does not happen to have been made and by analogy in the case of production of a certified copy, as the document would have proved itself if produced, so I think it proves itself by the proper proof and production of secondary evidence which the law allows to be substituted for the original in certain conditions. If this is not in itself sufficient, I think it is one of those cases which was probably contemplated by the general power of presumption given by S. 114, Evidence Act.

By that section the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business. S. 90 is really only one illustration of that general presumption. The law says, and rightly says, owing to the long period of time which has expired, that in a document 30 years old which is produced it is to be presumed that it was properly executed and attested. That is nothing more than having regard to the common course of natural events, human conduct and public and private business. The probability is that it was. It may of course, be expressly proved by the other side that it was not, but the party relying upon the document is not to be punished by its

inability to prove the affirmative. It seems to me that in applying the analogy of S. 90, which expressly provides for the production of the original, to the production of a properly established certified copy, the Court is merely exercising powers given to it under S. 114. In any case I think there is clear authority on the subject which ought to be followed in this Court. The point was decided by a single Judge in 1880 in the case of *Khetter Chunder Mukherjee v. Khetter Pal Sreeterutno* (1). That decision was followed by a two-Judge decision of this Court in 1900, reported in the case of *Ishri Prasad Singh v. Lallijas Kunwar* (2), which we ought to follow. A two-Judge Madras Bench took the same view in 1907 in the case of *Ponnambalath Parapravan v. Karoth Sankaran Nair* (3).

The only suggestions of an authority to the contrary are some obiter dicta by the first Court in 1914. A perusal of the record of that case shows clearly that these dicta, which occurred at the end of the judgment, were unnecessary for the decision. As my brother has pointed out, the case was disposed of at an earlier stage by a decision that the loss of the document was not established. The case has not been reported. The judgment shows clearly that the authorities to which we have referred were not mentioned or considered by the Court. I think it very unlikely, if the Court's attention had been drawn to these authorities, that they would have expressed the opinion which they did, at any rate without considerable argument. It is a point, as has been said, not free from difficulty and one which could not be disposed of by a few cursory observations. I think the dictum relied upon is not an authority at all.

By the Court. — The order of the Court is that the appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

***A. I. R. 1919 Allahabad 235**

PIGGOTT AND WALSH, JJ.

Prabhu Narain Singh—Plaintiff—Appellant.

v.

Ramzan and others — Defendants—Respondents.

Second Appeal No. 887 of 1916, Decided on 10th February 1919.

*** T. P. Act (1882), S. 40—Purchase with knowledge of restrictive covenant binding on vendor—Purchaser is liable for act done in breach of such restriction.**

The plaintiff granted to one *M* permission to build on certain land belonging to the former. *M* agreed that if at any time he sold any of the houses built by him upon the land, he would pay one-fourth of the purchase-money to the plaintiff. The heirs of *M* sold one of the houses to one *R*, who had notice of the covenant in favour of the plaintiff. Plaintiff thereupon sued *R* and the heirs of *M* to recover one-fourth of the purchase-money:

Held: that *R* and the heirs of *M* were jointly and severally liable in respect of one-fourth of the purchase-money which was payable to the plaintiff. [P 236 C 1]

Per Walsh, J.—A purchaser with notice of any restrictive covenant binding upon his vendor, as a condition of the interest or the grant which he enjoys in the land, is affected in equity with notice of such restriction and is liable after he becomes a purchaser for any act done in breach of such restriction. [P 236 C 2]

S. 40, was intended to codify this principle and governs this class of case. [P 237 C 1]

Bhagwati Shankar for *Gokul Prasad*—for Appellant.

Earibans Sahai and *Kanhya Lal*—for Respondents.

Piggott, J.—This second appeal arises on the following set of facts: In the year 1882 the plaintiff-appellant granted to one *Mt. Mahugi* permission to build on certain land belonging to him. He took from her a certain agreement, which contained amongst other stipulations the following, that if at any time she were to vacate the land and to sell any house or houses which she had built thereon, she would according to the ancient custom of the locality pay to the plaintiff one-fourth of the purchase-money. Admittedly the heirs and successors of *Mt. Mahugi* sold two houses built by the latter on the site in question to the defendant respondent *Ramzan*. The present suit was to recover from the surviving heir of *Mt. Mahugi* and from the said *Ramzan* one-fourth of the purchase-money. The Court of first instance gave a decree for the ascertained amount, recoverable jointly and severally from the two defendants. *Ramzan* appealed to the District Judge and the latter dismissed the suit as against him, holding that under the agreement only the heir of *Mt. Mahugi* was liable to answer the plaintiff's claim. The object of this appeal is to enforce the joint and several liability of the vendee *Ramzan*.

The case seems to turn, as the appellant rightly contends, on the nature of

the case set up by Ramzan in the trial Court. In the first and formal part of his written statement he denied, or put the plaintiff to proof of, all the allegations contained in the plaint, except the allegation that he, Ramzan, had purchased under a sale deed from the heirs of Mt. Mahugi. In his additional pleas, where the case which he specifically desired to set up was outlined, he said that having purchased the houses in question in the month of January 1910 he had paid one-fourth of the purchase-money to the actual proprietors of the site. He said that the plaintiff was not the owner of the site and had no interest in it whatsoever. The question of the ownership of the site has been determined in favour of the plaintiff and is not now in issue. The only question is whether, on the facts stated, the defendant Ramzan was or was not jointly and severally liable with his vendors to see that the proprietor of the site received one-fourth of the purchase-money, to which he was entitled under the contract. I think we must take it on the pleadings that Ramzan had notice of the fact that the proprietor or proprietors of the site had a right to receive one-fourth of the purchase-money, whatever might be the basis of that right. He never pleaded that he had paid the whole of the purchase-money to his vendors, either in ignorance of the existence of any right vested in the owners of the site, or on the strength of assurances that the vendors would satisfy the rightful claims of the owners of the site to one-fourth of the purchase-money. What he said was that he had himself been at pains to satisfy the rights of the zemindars of the land.

On this state of pleadings it seems to us that it was not open to the District Judge to find that the defendant was not jointly and severally liable along with his vendors to see that the plaintiff, as proprietor of the site, received the one-fourth of the purchase-money to which he was entitled. If the defendant set up a defence a portion of which was false to his knowledge, he must take the consequences of having done so. If, on the other hand, if it be assumed that he in good faith believed the defence set up by him to be true, then the position is that he had paid certain money, which the plaintiff was entitled to receive, under a misapprehension of fact to some other person

or persons. That does not acquit him of his liability to account for the same to the plaintiff. On these grounds I think the decree of the lower appellate Court should be reversed and that of the Court of first instance restored, the defendant respondent paying the costs in this and in the lower appellate Court.

Walsh, J.—I entirely agree. The judgment of the learned District Judge appears to me to result from a slight confusion between the cases where there is a custom proved and enforceable, and the cases where there is a mere agreement binding upon the particular party concerned relating to a specific subject-matter, which latter he seems to regard as not binding in any event upon a purchaser unless the purchaser has become by his own agreement expressly liable to perform the covenant. This seems to me to overlook the well-known doctrine that a purchaser with notice of any restrictive covenant binding upon his vendor, as a condition of the interest or the grant which he enjoys in the land, is affected in equity with notice of such restriction and is liable after he becomes a purchaser for any act done in breach of such restriction. The frequency with which these cases come up to this Court and the changes are rung by the dissatisfied party between custom, covenants running with the land, personal covenants, entries in the *wajibularz*, and what not, seems to me to make it desirable, and partly on that account I referred this case to a Bench of two Judges, to arrive at some distinct and definite principle by which the existence of the right in any particular case can be tested. It is of no use to members of the public and to the parties themselves to indulge in vague generalities and to say that in this case the party ought to be bound and in the other case he ought not to be bound. In this particular case there is no question of custom. That is found as a fact in favour of the respondent, nor is there any question of any personal covenant or liability undertaken by the respondent to the zamindar. There is an undertaking in the *sirkhat* under which the tenant enjoyed her holding binding her in the most absolute form (and alleging further that it was in accordance with a custom prevailing in that locality) not to part with her interest by transfer without the zamindar receiving his right of one-fourth of the

purchase-money, and it cannot be seriously contended that there is any legal or equitable ground which would justify a purchaser, who had read that document, in paying the tenant the purchase-money without seeing that the zamindar received his one-fourth share, or in other words, that the restriction which the tenant had imposed upon herself was not broken when the transfer took place. To my mind, if that is a correct view of the legal position, it is no more than the expression applied to this case of the old English rule in *Tulk v. Moxhay* (1). It is well illustrated by two decisions in this Court. In *Abadi Begam v. Asa Ram* (2) the original owner of land had bound himself to pay a monthly sum to his wife out of the income of the land and not to alienate the land without arrangement for the payment of such sum out of the income of the land.

He granted a usufructuary mortgage of the land to another person subject to the payment of the stipulated sum and such person gave a submortgage to another person orally agreeing with the submortgagee to continue the payment of the sum himself. In a suit by the wife against both the original mortgagee of the land and the submortgagee this Court held that the submortgagee, being in possession of the land, was bound to pay the sum out of his income to the wife with whom he had never entered into any agreement at all, and had never bound himself by any covenant in the mortgage-deed. All that he had done was to acknowledge the verbal notice of the liability and to promise verbally, not to the obligee, but to one of the intermediate transferors that he would pay the sum, and he had taken the property with notice of that restrictive covenant. *Churaman v. Balli* (3) is a decision of three Judges of this Court decided after the Transfer of Property Act and reported in *I. L. R.*, 9 *Allahabad* 591. The case was a suit for arrears of malikana and followed upon much the same lines. In my opinion S. 40, T. P. Act (4 of 1882) was intended to codify this principle and governs this class of case. The same view appears to be taken by the learned com-

mentators of this Act whom I propose to quote. Dr. Gour says:

"This section deals with what are known in the English law as 'restrictive covenants' and which are equitably enforced against all transferees under circumstances mentioned in the section. They are not covenants running with the land and hence not binding upon all purchasers with or without notice. Nor are they covenants of the nature of easements which avail against all the world. The object of this section is to protect covenants which are universally regarded as necessary for the improvement or beneficial enjoyment of one's property. And since these restrictions are not of the same importance as easements, or covenants running with the land, it is considered equitable that they should be enforced only as against transferees with notice, or gratuitous transferees."

In another passage he further illustrates this principle:

"If a purchaser knows of an encumbrance either before or after the execution of his conveyance, but before the payment of the whole of his purchase money, he will be liable to the extent of any purchase money which he subsequently, without the consent of such encumbrancer, pays to the vendor."

That is substantially the statement of the position in the case before us. In *Shephard and Brown* I find this passage:

"The rights mentioned in this section are not rights which come into existence on any transfer of property, nor is the third person" (in this case the zamindar) "to whom they belong a party to the supposed transfer. They are rights which previously to the transfer were available against the transferor, and the purport of the section is to state the conditions under which they may be enforced against the transferee."

In a further passage it is said:

"The liability of the purchaser must rest on the ground that in justice he ought not to evade the discharge of the obligation which was incumbent on his transferor."

That is the ground on which these cases one way or another have almost universally been decided, and I think that is the principle which S. 40 is intended to codify. If on the other hand it be contended, a view with which I do not myself agree, that the express language of S. 40 is not appropriate to the particular case, then the Courts must take refuge in an equitable principle analogous to the section. It seems to be recognized that the section is not comprehensive. To quote *Shephard and Brown* again:

"It is not clear that the section is intended to contain an exhaustive statement of the case in which, by operation of the doctrine of notice, the burden of an obligation is extended to persons who would not otherwise be affected by it."

And they then give by way of illustration the case of a sublessee. They go on to say:

(1) [1848] 2 Ph. 744.

(2) [1878-80] 2 All. 162.

(3) [1887] All 591.

"Such a covenant, though it might not come within the section and certainly could not be brought within the first part of it, would nevertheless it is submitted, be enforceable in India as in England against one who took with notice."

All of which goes to show that even in cases of the transfer of property, the contents of the Act or Code relating to the transfer of property are not exhaustive, and that the Courts are entitled to act upon general principles of equity even though they do not find them expressed in precise language by the Code itself. There is a long course of decisions in this Court giving effect to the principle now disputed by Mr. Haribans Sahai on behalf of the respondent in this case. They have generally been decided as questions of fact turning upon custom, but there is always room for controversy as to whether a finding on custom is a question of fact or a question of law; and where no custom has been found, the right of the zamindar has been protected by invoking or appealing to the principles of justice and equity. I have therefore endeavoured to express the true legal solution where no binding contract and no prevailing custom is established against the defendant.

By the Court.—The appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance restored, the defendant-respondent paying the costs in this and in the lower Appellate Court.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 238

RAFIQUE AND LINDSAY, JJ.

Bhukhi Sahu—Plaintiff—Appellant.

v.

Kodai Panday and others — Defendants—Respondents.

Second Appeal No. 300 of 1917, Decided on 11th March 1919, against decree of Addl. Judge, Gorakhpur, D/- 7th December 1916.

(a) **Hindu Law — Alienation — Father — Necessity—Burden of proof—High rate of interest—Mortgagee must also prove necessity justifying high rate of interest.**

Where a mortgagee is seeking to enforce a mortgage executed by the father of a joint Hindu family, he must prove not only that there was necessity for the loan secured by the mortgage, but also that there was such necessity as justified the agreement for a high rate of interest.

[P 238 C 2]

(b) **Interest—Reduction—Parties not parties to contract—Court can reduce contract rate.**

A Court has power, especially in a case in

which the parties to the suit were not parties to the contract, to reduce the rate of interest entered in the contract. [P 239 C 1]

Braj Nath Vyas and Iswar Saran—for Appellant.

Surendra Nath Sen, Haribans Sahai and Lakshmi Narain Tewari—for Respondents.

Judgment.—The only question for decision in this second appeal is whether the lower appellate Court was right in reducing the rate of interest entered in the bond which was put in suit.

The suit was a suit on a mortgage brought against Kodai Pande and his sons. Certain other defendants were impleaded as subsequent mortgagees. The sons resisted the claim on various grounds and pleaded, inter alia, that there was no legal necessity for the loan, and that there was no need for their father to borrow at the exorbitant rate of interest entered in the deed, namely, 25 per cent. per annum compoundable with yearly rests. An issue was raised in the Court of first instance regarding the propriety of this high rate of interest. The Subordinate Judge came to the conclusion that there was nothing harsh or unconscionable in the bargain and he allowed interest to the plaintiff at the contract rate. On appeal the learned Judge of the Court below has reduced the interest to 18 per cent. per annum simple. He relied upon certain authorities of this Court, viz., *Nand Ram v. Bhupal Singh* (1) and *Gaya Prasad Tewari v. Ram Phal Misir* (2). There is also another case to the same effect which is reported as *Raghunath Singh v. Nazir Begam* (3). It has been laid down in these cases that in suits of this nature where a mortgagee is seeking to enforce a mortgage executed by the father in a joint Hindu family, he must prove not only that there was a necessity for the loan secured by the mortgage, but also that there was such necessity as justified the agreement for a high rate of interest. The principle so laid down is derived from the judgment of their Lordships of the Privy Council in the case of *Hurro Nath Rai Chowdhuri v. Randhir Singh* (4). The argu-

(1) [1912] 34 All. 126=13 I. C. 5.

(2) [1915] 28 I. C. 21.

(3) [1913] 19 I. C. 639 affirmed by Privy Council in A. I. R. 1919 P. C. 12=50 I. C. 434=41 All. 571=46 I. A. 145 (P. C.).

(4) [1891] 18 Cal. 311=18 I. A. 1=5 Sar. 642 (P. C.).

ment before us is that the Court had no power to reduce the rate of interest except in a case which can be shown to fall under the provisions of S. 16, Contract Act. That argument does not apply and is well understood to apply to cases where the parties to the suit are the parties to the contract. In a case like the present however there is this difference: some of the parties to the suit are not parties to the contract and it is for the protection of the latter that the Courts have laid down the principle which we have enunciated above. We are of opinion therefore that on the authorities referred to by the learned Judge, he had the power to reduce the rate of interest and this being so, our finding on the only point urged in appeal is against the appellant. The appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 239**

PIGGOTT AND WALSH, JJ.

Fauja—Appellant.

V.

Emperor—Opposite Party.

Criminal Appeal No. 132 of 1919, Decided on 7th March 1919, from order of Addl. Sess. Judge, Cawnpore, D/- 30th January 1919.

Criminal P. C. (1898), Ss. 233, 234 and 235—Several murders by accused not so connected together as to represent series of acts forming same transaction—Single charge against accused is not legal.

The accused committed five murders in one day—three in one village in the forenoon and two in another in the afternoon. The trial Court, under the impression that the accused was being tried for two murders, framed a single charge against him, upon which he was convicted and sentenced to death:

Held: that the charge as framed contravened the provisions of Ss. 233 and 234, Criminal P. C., and that as the triple murder and the double murder were not so connected together as to represent a series of acts forming the same transaction, the procedure of the Court was not justified by S. 235 of the Code. [P 239 C 2]

Harendra Krishna Mukerji—for Appellant.

A. E. Ryves—for the Crown.

Judgment.—This is an appeal by one Faiz Mohammad, alias Fauja, who has been convicted by the Court of Session sitting at Hamirpur on a charge of murder and sentenced to death. The record is also before us for confirmation of the sentence of death. We are driven to the

conclusion that the charge as framed contravenes the provisions of Ss. 233 and 234, Criminal P. C., and is not justified by the provisions of S. 235 of the same Code. Broadly speaking, the case for the prosecution was that five persons were murdered, three in the course of the forenoon of 2nd June 1918, in the neighbourhood of the village called Bara and two others at a village called Srinagar on the afternoon of the same day. The triple murder and the double murder were not so connected together as to represent a series of acts forming the same transaction, so that the provisions of S. 235, Criminal P. C., do not apply. The Magistrate and also the trial Court, presumably took it for granted that they were trying the appellant for two murders and that this procedure was covered by S. 234. We are unable to accept this view, as it seems clear to us that the charge alleged the commission of five murders; that is to say, the killing of five human beings, in respect of each of whom a single charge of murder could have been framed.

On the principles laid by their Lordships of the Privy Council in *Subrahmaniam Ayyar v. King-Emperor* (1) it seems impossible to treat this as an irregularity, or to deal with the matter by taking into consideration the evidence offered, either in respect of the triple murder, or in respect of the double murder. We must set aside the conviction and sentence in this case and, in so doing, we must also set aside the conviction of one Binda, who was charged with abetment of the double murder under Ss. 302 and 114, I. P. C., and tried jointly with the appellant Fauja. We order both Fauja and Binda to be retried on a charge or charges properly framed. From the examination we have made of this record we can scarcely refrain from suggesting that the prosecution might be well advised to try the two accused, in the first instance for the double murder alleged to have been committed in village Srinagar and to await the result.

V.B./R.K.

Retrial ordered.

(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P. C.).

A. I. R. 1919 Allahabad 240

WALSH AND STUART, JJ.

L. Pearey Lal—Applicant—Appellant.

v.

Muir Mills Co. Ltd., Cawnpore—Respondent.

First Appeal No. 36 of 1919, Decided on 6th May 1919, from order of Dist. Judge, Cawnpore, D/- 15th November 1918.

Hindu Law—Joint family—Shares held by father on behalf of family—Son succeeding as manager on father's death is entitled to register them as holder in lieu of father.

S, the head of a Hindu joint family, purchased some shares in the Muir Mills Co., on behalf of the family. Upon his death his son became the manager of the family and applied to be registered in the books of the Company as the holder of these shares :

Held : that the son and the remaining members of the family were entitled to the beneficial interest in the shares by right of survivorship upon the death of the father and that under Arts. 30 and 9 of the Articles of Association of the company the son was entitled to be registered as the holder in lieu of his father of the shares in question. [P 241 C 1]

Panna Lal—for Appellant.*Arrendell*—for Respondent.

Walsh, J.—In this case a slight difficulty seems to have arisen as to who is entitled to be placed on the register of shareholders in a limited liability company in the event of the death of the head of a joint Hindu family. The facts are quite simple. One Sheomukh Rai, who was a holder of 80 shares in the Muir Mills Co. Ltd., Cawnpore, recently died leaving surviving him Pearey Lal, his son, who is sui juris and a grandson who is a minor. So far as we know, these are the only parties concerned in this application. The company, perhaps naturally not wishing to decide one way or the other whether the son was entitled to be registered, left him to make the necessary application to the Court having jurisdiction under the Companies Act to determine whether Pearey Lal was entitled to be so registered. Pearey Lal made an affidavit which, with the exception I will mention in a moment, is the only material we have before us with regard to the facts. However, such as it is, this material is uncontradicted inasmuch as the company do not oppose the application. The affidavit sets forth a claim by Pearey Lal to be the heir of his deceased father, but in a letter subsequently written by him to the Court on 23rd October 1918 he corrected

this defect explaining that it was a mistake of legal terminology and adding these facts which we are prepared to accept as though they were part of the original affidavit:

"Sheomukh Rai and myself were the members of a joint Hindu family. I became entitled to the joint family property as the sole survivor on the death of Lala Sheomukh Rai because there was no other member of the family then in existence."

It must therefore be taken and we find as a fact that the present applicant Pearey Lal is the manager of the existing joint Hindu family and he and the other member of the family are entitled to the beneficial interest in these shares by right of survivorship upon the death of the father. It is perhaps unnecessary to say that where any difficult and complicated question of fact arising out of a dispute between two adverse claimants to be placed upon the register upon the event of the death of the prior holder occurs, the Directors may, if they think fit, decide the matter on the material before them, but they are not bound to do so. They may think the material insufficient or the decision of the question too difficult and leave the rival applicants to fight out their right through the machinery of an application to the Court to rectify the register under S. 38, Companies Act. That is precisely how the present applicant has brought the matter before the Court. Art. 30 provides that: "any committee of a lunatic member and any person becoming entitled to shares in consequence of the death, bankruptcy or insolvency of any member upon producing such evidence, etc., may with the consent of the Directors, be registered himself as a holder."

It is to be borne in mind that Articles of Association are no part of the general law. They are rather terms of the contract or regulations by which persons joining a limited company agree to be bound and regulated in the conduct of the affairs of the company, and the provisions made by the Articles of Association are usually and must necessarily be made with due regard on the one hand to the rights of the shareholders and their successors-in-interest, but on the other hand to the convenient management of the affairs of the company. And amongst other things it would be extremely embarrassing to the books and the management of the company if in the case of a joint Hindu family all the members of which are by law entitled to the shares

which have been purchased out of the joint funds they had the right as against the company to insist each one of them upon having their names entered amongst the holders of the shares. A similar difficulty is likely to occur where there are several executors of a will or several trustees entitled under a trust deed, and the company have therefore provided what is almost a common form by Art. 9 that though they may they cannot be compelled to register more than one name as the holder of a particular block of shares. Similarly they are not compelled to recognize trusts, the trustee or holder, for the time being of any block of shares in which other persons may be beneficially interested is the person recognized by the Articles of Association as the person entitled to the shares for the time being and entitled to be registered as the holder thereof. Turning to Art. 30, speaking at any rate for myself, I find myself quite unable to agree with the view of the District Judge that the Articles do not contemplate and are not appropriate for the recognition of the rights of a joint Hindu family. Art. 30, as I have already pointed out provides for any person becoming entitled to shares in consequence of death to be registered if the Directors are satisfied with the evidence of his title. I think those provisions are quite wide enough to cover the members of a joint Hindu family. The survivors are all entitled to the shares in consequence of death by survivorship. If that be the correct view, it is only necessary to superimpose upon the provision made by Art. 30 the provision made by Art. 9, or in other words the Directors are not bound to recognize more than one person of such joint Hindu family as the person entitled to be placed upon the register. Who is such person, is as I have said, in every case a mere question of fact and in this case a particularly simple one. Ordinarily speaking, he would be the manager or in other words in a great majority of cases the senior male surviving adult member of the family. Applying these principles to the present case we think that there was no reason for rejecting the application. We are satisfied that Pearey Lal is the manager of this joint Hindu family and that as such under the general provisions of Arts. 30 and 9 he is entitled to be registered as the shareholder in lieu

of his father and all the share registers are to be rectified accordingly. I will just add one word as the matter is mentioned in argument. Whether he is or he is not a member of a joint Hindu family is no concern really of the Directors although as I have said they may decide whether he is *prima facie* entitled to be registered on such evidence as they think sufficient in each case. But so far as this case is concerned, we have acted upon the sworn statement of the applicant corrected by his letter to the effect that he is the manager of this joint Hindu family. So far as he is concerned in any question which may arise with regard to the beneficial interest in these shares, he is estopped for ever by having obtained this order upon his own representation from alleging that he has a separate and self-acquired interest.

Stuart, J.—I concur. The case put forward by Pearey Lal is that the shares were purchased by his father Sheomukh Rai on behalf of the joint Hindu family, of which Sheomukh Rai was the head and of which Pearey Lal and his son are members. In other words, all the shares were the property of the joint Hindu family. They were entered in the name of the karta. This is perfectly unobjectionable. When the karta died it became necessary to substitute the name of his successor. Art. 30 of the Articles of Association appears to me to cover the case. Pearey Lal has become entitled to the entry of his name in consequence of the death of Sheomukh Rai. It is pointed out by the learned Counsel for the company that the words of the article are "any person becoming entitled to shares" and that I am interpreting the article as though the words were "any person becoming entitled to registration," but I think I am stating the intention of the framers, and I do not think that I am stretching the words unduly in finding that Pearey Lal is entitled to the shares.

By the Court.—We allow the application, set aside the order of the Court below and direct that the name of Pearey Lal be entered in the share registers of the Muir Mills Co. Ltd., in place of Lala Sheomukh Rai, deceased, and that all the share registers of the company be rectified accordingly. Each party should bear its own costs.

V.B./R.K.

Application allowed.

A. I. R. 1919 Allahabad 242

WALSH AND STUART, JJ.

Arbindakeb Rai— Defendant— Appellant.

v.

Jageshar Rai and others— Plaintiffs— Respondents.

First Appeal No. 175 of 1918, Decided on 6th May 1919, from an order of Offg. Addl. Judge, Gorakhpur, D/- 15th November 1918.

(a) Limitation Act (1908), S. 19—"Acknowledgment," meaning of—Sale of mortgaged property to mortgagee—Mortgage acknowledged in sale deed—Recital held to be acknowledgment.

The word "acknowledgment" in S. 19 means a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given. Defendant 1 by separate deeds mortgaged his property as follows: On 15th February 1892 to *B* (the plaintiff); On 14th July 1892 to *C* (father of defendant 2); On 7th June 1894 to *D* (father of defendants 3 and 4); On 31st July 1897 to *B*, (the plaintiff). On 24th June 1910 he sold the hypothecated property to *B* in lieu of his mortgage of 31st July 1897 and in the sale deed acknowledged this mortgage. Prior to the execution of the sale deed, *C*, in 1908 and *D*, in 1909 had obtained decrees on their mortgages and brought the property to sale, which was purchased by themselves. They received possession on 6th February and 9th June 1914 respectively, thereby dispossessing *B*, who thereupon brought the present suit on his mortgage of 31st July 1897 to recover his mortgage-money by sale of the property. It was objected that the suit was barred by limitation but the plaintiff relied on the acknowledgment contained in his sale deed:

Held: that the acknowledgment relied on for extending the period of limitation came within the language of S. 19 and the suit was not barred by limitation. [P 242 C 2]

(b) Practice—Trying case till ready for judgment and then disposing of it on preliminary point—Practice condemned.

The practice of trying a case till it is ready for judgment and then disposing of it on a preliminary point, condemned as tending to cause needless delay and unnecessary expense.

[P 243 C 1]

P. L. Banerji—for Appellant.*Iswar Saran*—for Respondents.

Walsh, J.— We think this appeal must be dismissed. We do not think that it is necessary to discuss all the authorities which have been mentioned in the judgment of the Court below and the argument before us. We do not mean by this that the argument has exceeded in the least the limits of what was reasonable having regard to the difficulty of the point raised, but we think the difficulty of the point raised has been largely accentuated by a tendency on the part of some Judges to

travel a little beyond the actual province within which they are called upon to determine the question. The real question we have to determine in this suit is whether the acknowledgment relied upon by the plaintiff as extending the period of limitation was given within the meaning of S. 19, Lim. Act, that is to say, was it given by some person through whom the defendant derives title or liability? We have come to the conclusion that it is impossible to say that it is not, and that it is impossible to take it out of the plain language of the section. It is really immaterial to consider the various equitable considerations which bear upon the interpretation. We really have no alternative but to reiterate the language of the section. The Calcutta High Court although it is perfectly true that their decision under S. 20 was sufficient to justify the allowing of the appeal, nevertheless took the same view that we now take of the language of S. 19.

Mr. Peary Lal has pressed upon us a distinction between that case and the present in this respect, that in that case the acknowledgment was antecedent to the transaction by which the defendant derived title from the mortgagor. We think this makes no difference in the interpretation of the Statute. The real question is, not when was the acknowledgment given nor when did the transaction of transfer take place, but was the acknowledgment really a genuine acknowledgment as and when it was given? A suppositious case is put forward: A mortgagor, after getting rid of all his interest, has given a friendly or collusive acknowledgment to the mortgagee so as to extend the mortgagee's remedies against the third party when the mortgagor had no further interest in the subject-matter. In my judgment the answer is this: that the word "acknowledgment" in the section must mean a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given. In these circumstances the case must go back for trial upon the merits. The appeal is dismissed with costs, including in this court-fees on the higher scale. I should like to add that it is, in my opinion very unfortunate. I have said over and over again in order to draw the attention of the trial Courts to it—that

after all the evidence is taken on the issues and the case argued and ready for judgment, the learned Judge when he sits down to write the judgment should decide the case upon a preliminary point. If he turns out wrong, it involves three years' delay and a great deal of unnecessary expenditure. It may be that the determination of the other issues renders the decision of this point totally superfluous. It is better and far cheaper in the interests of the parties themselves that when an appeal is brought against the decision of a preliminary point, the appellate Court should have all the findings before it and be in a position to give a final decision on the case.

Stuart, J.—I concur in the order proposed.

V.B./R.K.

Appeal dismissed.

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RAFIQUE AND PIGGOTT, JJ.

Badri Prashad and others—Plaintiffs—Appellants.

v.

Gopal Behari Lal and others—Defendants—Respondents.

First Appeal No. 160 of 1916, Decided on 3rd March 1919, against decision of Sub-Judge, Mainpuri, D/- 6th March 1916.

Civil P. C. (1908), O. 32, R. 7—Compromise by guardian on behalf of minor—Leave of Court not obtained—Compromise can be avoided—Absence of order granting permission—Presumption is no permission was granted.

Where the guardian of a minor litigant fails to obtain the leave of the Court to enter into a compromise on behalf of the minor, it is open to the minor, under O. 32, R. 7, to avoid the compromise. [P 245 C 2]

In the absence of an order granting permission to the guardian of a minor litigant to enter into a compromise on behalf of the minor, the presumption is that no such permission was given. [P 245 C 1]

Tej Bahadur Sapru, Moti Lal Nehru and Baleshwari Prasad—for Appellants.

B. E. O'Connor and Narayan Prasad Asthana—for Respondents.

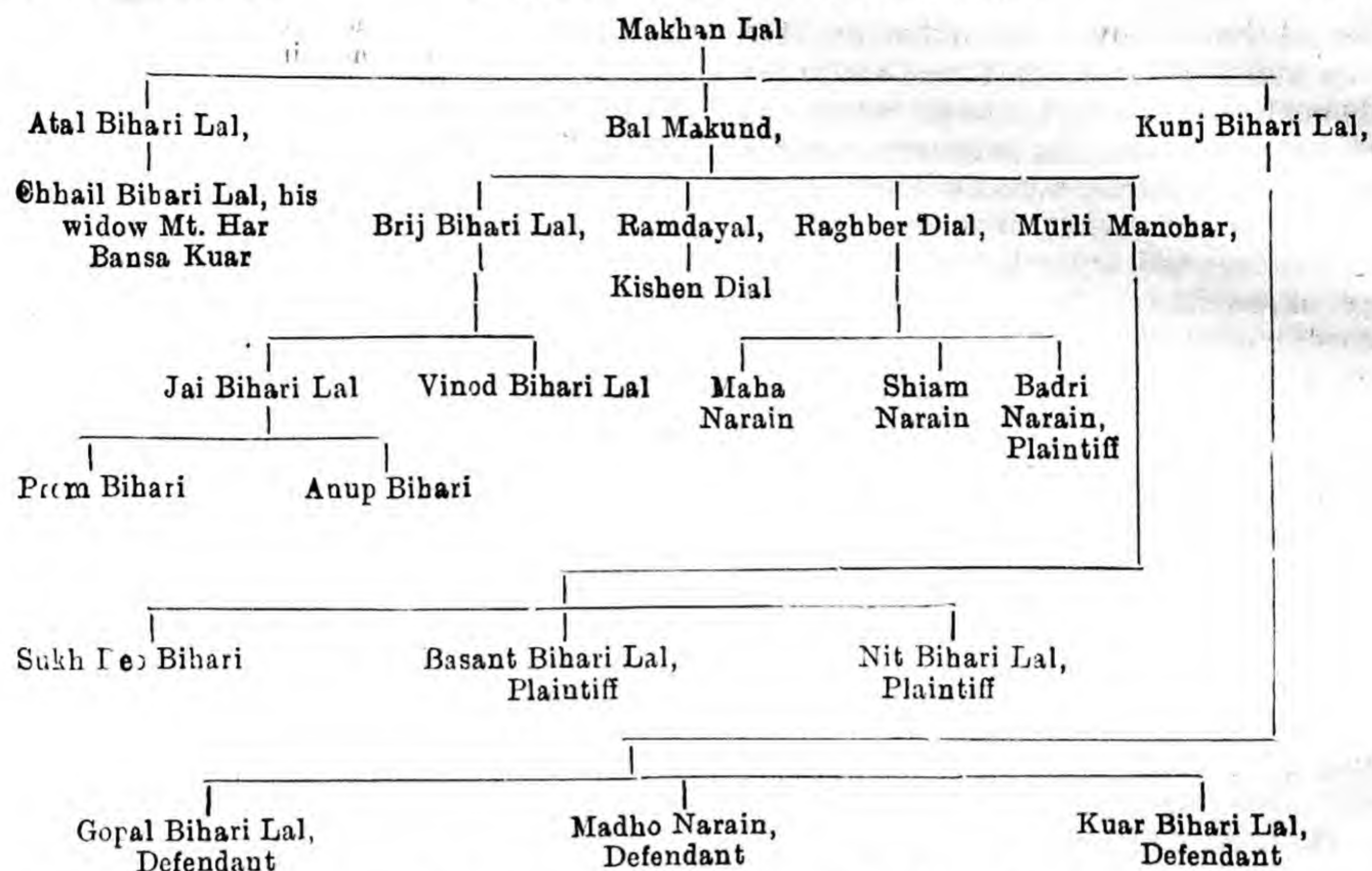
Judgment.—The following pedigree will explain the right under which the parties to this appeal are litigating:

[For pedigree table see p. 244]

The property in suit is alleged to have belonged to Chhail Bihari Lal, a grandson of Makhan Lal. Chhail Bihari Lal died about 25 years ago leaving him surviving a widow of the name of Mt. Harbansa Kuar. She died on 26th August 1910.

On her death a dispute arose between the grandsons of Bal Makund and Kunj Bihari Lal, the reversioners to Chhail Bihari Lal. There were 11 persons living at the time, namely Badri Narain, Basant Bihari, Nit Bihari Lal, Kishen Dial, Maha Narain, Shiam Narain, Vinod Bihari, Sukhdeo Bihari, Gopal Bihari Lal, Madho Narain and Kuar Bihari Lal. The first eight were the grandsons of Bal Makund and the last three were the grandsons of Kunj Bihari Lal, and all the 11 stood in the same degree of relationship to Chhail Bihari Lal. In 1912 the grandsons of Bal Makund instituted a suit against the grandsons of Kunj Bihari Lal to recover eight-elevenths of the property alleged to have belonged to Chhail Bihari Lal. Three of the then plaintiffs, namely Sukhdeo Bihari, Basant Bihari Lal and Nit Bihari Lal, the sons of Murli Manohar, were minors at the time. Shiam Narain, their first cousin, was appointed their next friend for the suit. After several hearings a petition of compromise was filed on 11th September 1912.

It was filed by Chaudhri Damnai Lal and B. Binod Bihari Lal, Pleaders for the plaintiffs, and Madho Narayan. Binod Bihari Lal was one of the plaintiffs in the case and Madho Narayan acted for self and as guardian of his younger brother Kuar Bihari Lal. The Court directed the pleader for the plaintiffs to produce his clients for verification of the compromise on a subsequent date, namely 8th October 1912. The case was taken up, but the verification on behalf of the plaintiffs was not made and 13th November 1912 was fixed for filing of the written statement. The case was adjourned from time to time for various reasons and on 11th December 1912 a fresh compromise was filed which was dated 6th December 1912. The Court directed that the parties should appear before it the next day to verify the compromise. On 12th December 1912 Binod Bihari Lal, one of the plaintiffs, and Madho Narayan, one of the defendants, were alone present. Babu Binod Bihari Lal objected to the compromise and the case was put off to 4th February 1913 for the reception of any objection that other parties may have to the compromise. On 4th February 1913 the case was taken up and an objection was filed on behalf of Shiam Narain, Kishen Dial



and Maha Narain against the compromise on the allegation that it was injurious to the rights of the plaintiffs and especially the rights of the minor plaintiffs, and that the leave of the Court had not been asked for or granted to the minor plaintiffs to enter into a compromise. An application purporting to have been written on 6th December 1912 by Shiam Narain, the next friend of the four minor plaintiffs, namely Sukhdeo Bihari Lal, Basant Bihari Lal, Nit Bihari Lal and Badri Narain, was tendered on behalf of the defence. The application asked for leave of the Court to accept the compromise of 11th December 1912 on the ground that it was beneficial to the rights of the minor plaintiffs. The application was re-dated 4th February 1913. The pleader for Shiam Narain and the other plaintiffs admitted the writing of the application by Shiam Narain, but objected to it on the ground that it was to be produced in Court only on condition that some other matters which did not appear in the application had been settled between the parties out of Court and which had not been settled. Objections were filed to the compromise of 11th December 1912 by some other plaintiffs also. The trial Court framed an issue with regard to the validity of the compromise and fixed 16th April 1914 for disposal of the issue, directing the parties to produce their evidence, both oral and documentary, on the date of hearing.

On 31st March 1913, before the date fixed for hearing of the case, an application was filed on behalf of the parties, accepting the compromise of 11th December 1912, with certain amendments.

The application was verified by Madho Narain, one of the defendants for himself and as guardian of his minor brother Kuar Bihari Lal. Prabhat Chandra, pleader for the other defendant namely, Gopal Narain, verified the application for his client. Babu Binod Bihari Lal verified it for self and Kharagjit Misra, pleader, verified it on behalf of Kishen Dial, Maha Narain and Shiam Narain. In compliance with the application, Cl. 6 of the compromise was deleted. The same day a decree was passed in terms of the compromise. The result of the compromise decree was that the eight plaintiffs, namely the grandsons of Balmakund, got half of the zamindari property in suit and the three grandsons of Kunj Behari Lal retained the other half. In other words, instead of getting $\frac{8}{11}$ ths of the property, the plaintiffs got $\frac{1}{2}$ the property. Within 18 months of the compromise decree the two minor sons of Murli Manohar, namely Basant Bihari Lal and Nit Bihari Lal, and the minor brother of Shiam Narain, namely Badri Narain, brought the suit out of which this appeal has arisen, for the recovery of the difference between the share they would have got under the Hindu law and the share they were allotted under

the decree. They stated in their plaint that they were minors at the time of the suit of 1912 and that the compromise upon which the decree was passed on 31st March 1913, was made without obtaining the leave of the Court as was required under the law, and that the compromise had injuriously affected their interests. They further alleged that the compromise in question was fraudulent and collusive. The claim was brought against the three grandsons of Kunj Bi-hari Lal. The other eight persons, who were co-plaintiffs in the former suit, were not made parties to the present suit. The claim was resisted on various pleas. The Court of first instance disposed of the case on the first issue only, namely whether the compromise decree is valid and binding on the plaintiffs. The learned Judges held that the compromise upon which the decree was passed was not fraudulent and collusive, nor was it injurious to the rights of the minor plaintiffs; nor can it be said that it was made without the leave of the Court. The other issues raised in the case were not decided. The plaintiffs in appeal to this Court do not challenge the finding with regard to collusion and fraud. They however impeach the decree of the Court below on the other two points. They contend that the compromise was injurious to their interests and that it was entered into without obtaining the leave of the Court.

We think that the contention of the plaintiffs-appellants must prevail with regard to the omission to obtain leave of the Court authorizing the guardian of the minor plaintiffs in the suit of 1912 to enter into a compromise. The learned Judge of the lower appellate Court admits that no such leave was granted, but thinks that as the trial Court was aware of the fact that there were some minor plaintiffs in the case, the matter was before its mind and the omission to record a formal order is immaterial. We are unable to agree with the learned Judge of the lower Court. The law on the subject is embodied in O. 32, R. 7 which is as follows:

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of

the Court so recorded shall be voidable against all parties other than the minor."

The learned counsel for the plaintiffs-appellants refers to the following cases: *Manohar Lal v. Jadunath Singh* (1), *Subramanian Chettiar v. Rajeswar Dorai* (2), *Jamna Bai Saheb Mohitai Avergal v. Vasanta Rao Ananda Rao Dhybar* (3), *Hanuman Rai v. Jagdis Rai* (4), *Ganesha Row v. Tulja Ram Row* (5). For the respondents the argument of the lower Court is adopted and in reply to the case-law it is contended that their Lordships of the Privy Council in the case of *Manohar Lal v. Jadunath Singh* (1) remarked as follows:

"In the opinion of their Lordships there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition or in some way not open to doubt that the leave of the Court was obtained."

In the present case it is said that the proceedings of the suit of 1912 leave no doubt that the attention of the trial Court was directly called to the fact that some of the plaintiffs in the case were minors and were entering into a compromise. In support of this the proceedings of 4th February 1913 are referred to. We think that the present law is more strict than the dictum of their Lordships in the case of *Manohar Lal v. Jadunath Singh* (1), which was given under S. 462, Civil P. C., Act 14 of 1882. Under the old law the words "expressly recorded in the proceedings" did not appear. There is admittedly no order of the Court in the suit of 1912 expressly recording permission to Shiam Narain to enter into a compromise on behalf of his minor brother and his minor cousins. Under the sub-Cl. 2, O. 32, R. 7, the compromise of 11th December 1912, upon which the decree of 31st March 1913 was passed, having been entered into on behalf of the minors without the leave of the Court, is voidable at the instance of the minors. We therefore hold that the decree in question is not binding on the present plaintiffs. The case however is not disposed

(1) [1906] 28 All. 585=33 I. A. 128=9 O. C. 219 (P. C.).

(2) A. I. R. 1915 P. C. 33=39 Mad. 115=32 I. C. 253 (P. C.).

(3) A. I. R. 1916 P. C. 2=39 Mad. 409=34 I. C. 213=43 I. A. 99 (P. C.).

(4) [1917] 35 I. C. 675.

(5) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).

of by this finding. It is argued on behalf of the respondents that even if the compromise decree is not binding upon the plaintiffs, it should not be set aside unless and until it is shown that the compromise in question was in fact injurious to the interests of the minor plaintiffs. The learned Judge of the lower Court has found that the compromise in question was not injurious to the plaintiff's interests. The reasoning upon which he has come to that conclusion does not commend itself to us. It is conceded on behalf of the respondents that the finding as it stands is insufficient and inconclusive. The learned Judge ought to have taken into consideration the value of the share of the plaintiffs under the Hindu law to which they were entitled, namely, 3/11ths of the property alleged to have belonged to Chhail Bihari and the share that was allotted to them under the compromise.

It should also have considered the transaction that preceded the compromise, namely the sale of Muhabbatpur and Mehrabad to the defendants and the sale of a portion of Shahjalpur by the latter to the plaintiffs. There was an allegation that the defendants had paid almost double the price of the plaintiffs' shares in the villages of Muhabbatpur and Mehrabad in consideration of the compromise that was subsequently entered into; that is in other words, in consideration of the plaintiffs relinquishing a portion of their share in the inheritance. Another point to be considered in the case is, if the plaintiffs are not to be bound by the compromise decree of 31st March 1913, should their claim be decreed in full or should they be put upon terms. The learned Judge of the lower appellate Court did not have this question before his mind. We think that this appeal must prevail, but, as the case is going back to the lower Court we direct that in addition to the issues that it has left untried, it should also try the following issues: (1) Whether the compromise injuriously affected the right of the plaintiffs? (2) Assuming that the plaintiffs are not bound by the decree of 31st March 1913, are they entitled to recover the property in suit or any of it unconditionally or should they be put upon terms, if so, upon what terms?

The first issue the Court below will try in the light of the remarks we have

made above. We therefore allow the appeal, set aside the decree of the Court below and remand the case for trial under O. 41, R. 23, Civil P. C. The costs of this appeal to abide the event and the costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 246

WALSH AND RYVES, JJ.

Sardanand Rai and others—Defendants—Appellants.

v.

Sohawan Khan and others—Plaintiffs—Respondents.

Second Appeal No. 650 of 1917, Decided on 12th June 1919, from decree of Dist. Judge, Ghazipur, D/- 12th January 1917.

Transfer of Property Act (1882), S. 60—Integrity of mortgage broken with consent of mortgagee—Mortgagor can redeem portion of mortgage.

Where the integrity of a mortgage is broken up with the consent of the mortgagee and a moiety is redeemed, neither he nor those who claim through him can afterwards invoke in their aid the rule which prohibits the breaking up of a mortgage so as to entitle a mortgagor to redeem any portion thereof which he feels disposed to redeem. [P 247 C 1]

Tej Bahadur Sapru and Komalakant Varma—for Appellants.

M. L. Agarwala and U. S. Bajpai—for Respondent.

Walsh, J.—This is a perfectly plain case. Two persons, many years ago, mortgaged two distinct and separate properties in which they were separately interested for one joint sum; in other words, they joined in mortgaging their separate estates. Shortly afterwards, the mortgagee died and his heirs, who, I am satisfied and, if necessary, should be prepared to find, were members of a joint Hindu family, took in what has been called by the lower appellate Court a partner cosharer and somehow or another, which does not appear, and the best persons to inform the Court about it were the present appellants, that partner became possessed of a moiety of the total mortgaged property by buying Sheoshankar Khan's share. With regard to the other moiety there would appear from the finding of the lower appellate Court to have been a sort of partition, because one Sankata Prasad Rai is said to be in possession of one anna two ganda share and one Mahesh Rai and the pre-

sent appellants between them to be in possession of another one anna two gandas share, those two shares together making up the total of the second moiety which the other mortgagor mortgaged with Sheo-shankar's two annas four gandas. It is significant, to say the least of it, that neither Sankata Prasad nor Mahesh Rai appealed even to the lower appellate Court from the original decision in this case. The plaintiffs seek to redeem the other half which was not purchased by the partner on payment of half the mortgage money and both Courts have held them entitled to do so.

The appellants, being some at any rate of the descendants or heirs of the original mortgagee, appeal against that decision, and invoke in their aid the rule which prohibits the breaking up of a mortgage so as to entitle a mortgagor at his own sweet will and pleasure to redeem any portion thereof which he feels disposed to do. In my view the integrity of this mortgage has been completely broken up by the consent of the appellants or the persons through whom they claim, and that being so, it is hardly possible to conceive of a more hopeless appeal. Apart from that I should have been prepared to follow the principle laid down in *Narain v. Ganpat* (1), where the exception to the general rule that a mortgagee has a right to insist that his security shall not be broken up are set out. One of them includes a case in which the original contract shows that the mortgagees joined together in mortgaging each his separate share. I think that applies to this particular mortgage and, if necessary, I should have been prepared so to decide. But the ground on which I think this appeal ought to be dismissed is that the present appellants have been party either themselves or through their predecessors to the breaking up of the integrity of this mortgage.

Ryves, J.—I agree.

By the Court.—The appeal must be dismissed with costs, including in this court-fees on the higher scale.

V.B./R.K.

Appeal dismissed.

(1) [1897] 21 Bom. 619.

A. I. R. 1919 Allahabad 247

RICHARDS, C. J. AND BANERJI, J.

Gulab and others—Defendants—Appellants.

v.

Mutasaddi Lal—Plaintiff—Respondent.

First Appeal No. 17 of 1919, Decided on 15th April 1919, from the order of 1st Addl. Judge, Aligarh, D/- 21st November 1918.

Limitation Act (1908), Art. 11—Objection to attachment dismissed—Suit by objector or his vendee must be brought within one year from date of order—Civil P. C. (1908), O. 21, R. 63.

Where a person objects to the attachment of property in execution of a decree on the ground that it is not the property of the judgment-debtor, and on being afforded an opportunity to adduce evidence in support of his objection fails to do so and his objection is disallowed, a suit by him or his vendee to establish his right must, under Art. 11, Sch. 1, Lim. Act, be brought within one year from the date of the order; otherwise it will be barred by time. [P 248 C 1]

G. Agarwala—for Appellants.

Gulzari Lal—for Respondent.

Judgment.—The facts connected with this appeal are shortly as follows: More than a year before the institution of the present suit certain property was attached in execution of a decree. An objection was put forward by the plaintiff's vendor that the property was not the property of the judgment-debtor, and therefore was not liable to attachment. The objector not only stated the nature of his objection, but he made an application to summon his witnesses. Upon a date fixed for the hearing of the case he was present, but the case was adjourned until another date to enable him to appear. Upon the adjourned date he did not appear, and the Court below made an order disallowing the objection "in the absence" of the objector. The present suit was then instituted by a purchaser from the objector more than a year after the objection of his vendor had been disallowed in the manner stated. The Court of first instance held that the suit was barred by the provisions of Art. 11, Lim. Act. The lower appellate Court reversed the decree and remanded the case, holding that inasmuch as the objection had been disallowed "in the absence" of the objector there had been no investigation, and therefore the article of limitation did not apply. We think the Court below was wrong. It is admitted that if the objector had appeared on 2nd

September 1916 (the day on which his objection was disallowed in his absence) and stated that he could not sustain his objection, then the article would have applied. We find it impossible to hold that where an objector comes forward and says that he cannot sustain an objection, the article applies, while if he takes care to remain absent, the article will not apply. It is quite clear that the policy of the law is that these objections should be speedily decided and that there should be a short period of limitation allowed for the party against whom the order was made. It seems to us quite clear under the circumstances of the present case that an order was made "against" the vendor of the plaintiff and that the plaintiff can be in no better position than his vendor. Accordingly we allow the appeal, set aside the order of the Court below and restore that of the Court of first instance with costs.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 248**

WALSH AND RYVES, JJ.

Jagdishwar Prasad—Appellant.

v.

Sheo Baksh Rai—Respondent.

Second Appeal No. 519 of 1916, Decided on 9th June 1919.

(a) **Contract Act (1872), S. 23—Contract for payment of money by parent of either boy or girl after performance of marriage is not opposed to public policy.**

Where a contract provides that when a marriage has been arranged and performed the parent of either the boy or the girl who is a party to the marriage shall pay a certain sum of money, the contract is not void ab initio as being opposed to public policy. [P 248 C 2]

(b) **Hindu law—Alienation—Money advanced to Hindu female for one legal necessity used for other equally valid purpose—Transaction is not invalid.**

The fact that money advanced to a Hindu female for one legal necessity is used or diverted to some other purpose equally valid is not sufficient in itself to invalidate the transaction. [P 248 C 2]

Tej Bahadur Sapru, D. C. Barerji and Kanhya Lal—for Appellant.

S. N. Sen and Gokul Prasad—for Respondent.

Judgment.—We have come to the conclusion that this appeal must be dismissed. There is nothing in the question of public policy raised. No doubt, it is the law in India as in England that a contract to provide a child in marriage in consideration of a money payment

will not be enforced in a Court of law. That is a very different thing from saying that when a marriage has been arranged and performed, a payment by the parent of either the boy or the girl who is a party to the marriage is a contract which is void ab initio as being against public policy. No authority has been quoted which goes to this length and which would involve condemning a large proportion of marriage contracts in this country. Secondly, we cannot find anything in S. 92, Evidence Act against which this case, as found by the Courts below, offends. In substance the document in question stipulated for consideration divided into three classes, Rs. 500 for pilgrimage to Gya, Rs. 500 for debts in connexion with the lady's daughter's marriage and Rs. 200 for the repairs of her house. Each of these classes of liability would be sufficient, if established in fact, to support legal necessity. On the facts found Rs. 1,200 of the Rs. 2,000 was money retained by the mortgagee to be used as and when it suited the mortgagor's purpose for the repairs of the house.

Circumstances however becoming too strong for her and involving a change of intention, Rs. 1,000 of this Rs. 1,200, in the events which happened, was utilised to discharge a liability which she had incurred to the father of her daughter's husband, in respect of her daughter's marriage. Whether or not owing to the fact that her daughter had already been betrothed and had reached the somewhat advanced age of eighteen exceptional pressure was exercised upon her does not really matter in our opinion. The long and short of it is this that whereas the money was advanced for legal necessity which included amongst other things liabilities in respect of the daughter's marriage, in the event, after it was advanced, it was used or diverted to some other purpose equally valid, which would have been sufficient to support the transaction if it had been the original object and stated consideration for which the advance made. We do not think that this circumstance is sufficient in itself to invalidate the transaction. We therefore agreeing with the lower appellate Court, dismiss this appeal with costs, including in this court-fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 249

PIGGOTT AND WALSH, JJ.

Chhote Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 752 of 1917, Decided on 8th November 1917, made by Dist. Magistrate, Banda.

(a) Penal Code (1860), Ss. 441, 448, 454 and 509—House trespass by night—Evidence showing that man, perfect stranger, found lurking inside house of another—Prosecution can ask Court to infer guilty intention sufficient to bring his case within S. 441—Court while considering such allegation by prosecution should not overlook S. 509.

Where the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the Court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of S. 441, I. P. C. [P 249 C 2; P 250 C 1]

In dealing with cases of this sort Magistrates should not overlook the existence of S. 509, I. P. C., when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. [P 250 C 1]

In a case where an accused person forcibly or clandestinely enters a house which he knows to have been definitely closed and barred against him by the owner thereof, it is not a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The Court may find on the facts that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. [P 250 C 1,2]

Per *Walsh, J.*—Where in answer to a charge of lurking house trespass by night the accused sets up the plea that he entered the house in order to carry an intrigue with one of the women of the house and establishes that there was an invitation or complicity by the woman combined with an intention to preserve strict secrecy, then it is difficult to say that there was any intention to annoy a third person, but if that third person had expressly prohibited the accused from entering the house, then his act becomes a direct defiance of an express order, and an intention to annoy the author of the order can be inferred from it. [P 251 C 1]

(b) Penal Code (1860), S. 454—Lurking house trespass by night—Accused alleging that he had some specific innocent intention in entering house—Burden is on accused to establish particular intent under Evidence Act (1872), S. 106.

Where a person accused of lurking house trespass by night pleads in his defence that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house

the provisions of S. 106, Evidence Act come into play and the burden of establishing the particular intent is upon the accused. [P 250 C 1]

Piggott, J.—This is a reference by the District Magistrate of Banda in a case in which one Chhote Lal was tried summarily by a First Class Magistrate of that district. The offence alleged was that of lurking house trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in S. 443, I. P. C., but also that the lurking house trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witnesses. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded, further, that he had entered the house at the express invitation of this woman. The trying Magistrate refused to inquire fully into the facts. He has left it uncertain whether there was any truth in the defence above set out. He says that even on the accused's own statement of the facts, an offence, namely, the offence of lurking house trespass by night, punishable under S. 456, I. P. C., was established. He convicted and sentenced Chhote Lal accordingly.

The District Magistrate, in referring the case, has relied upon the reported decision of a Judge of this Court in the case of *Gaya Bhar v. Emperor* (1). It has been suggested that this decision is inconsistent with that of another Judge of this Court in the case of *Mulla v. Emperor* (2). In our opinion the two decisions are not inconsistent and we agree substantially with both of them. When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the Court to infer

(1) [1916] 38 All. 517=35 I. C. 979.

(2) A. I. R. 1915 All. 173=29 I. C. 67=37 All. 395.

from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of S. 441, I. P. C. This was clearly laid down in the case of *Balmakand Ram v. Ghansamram* (3) and also in the case of *Premanundo Shaha v. Brindabun Chung* (4). And in dealing with cases of this sort we may remark that Magistrates should not overlook the existence of S. 509, I. P. C., when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. Difficulties are only likely to arise when the accused himself pleads in his defence and establishes, either by direct evidence or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house.

The provisions of S. 106, Evidence Act (Act 1 of 1872), may also be referred to in this connexion. In the case now before us the accused alleged two things: firstly, that he had entered the house at the request of one of its inmates and, secondly, that he had no intention of insulting or annoying the complainant Badri. Presumably it might be suggested in his defence that this latter plea was sufficiently established by the precautions taken by him to conceal from Badri the fact of his presence in the house. At any rate it was clearly no part of the case for the prosecution that Badri knew of the existence of any intrigue between the accused Chhote Lal and his mother, or had ever forbidden Chhote Lal's access to his house on the ground of his knowing or suspecting the existence of such intrigue. We make these remarks because we think it possible that the decision of the learned Judge of this Court in the case of *Gaya Bhar v. Emperor* (1) may possibly be interpreted too widely and may be held to apply to cases in which an accused person has forcibly or clandestinely entered a house, which he knew to have been definitely closed and barred against him by the owner thereof.

In such cases it might not be a suffi-

cient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The Court may find on the facts that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. On this point the remarks of the learned Judges of the Bombay High Court in the case of *Emperor v. Lakshman Raghunath* (5) are certainly pertinent. In our opinion there should have been a further inquiry into this case before the accused was either convicted or acquitted. He was himself anxious to summon the complainant's mother as his witness, and the trying Magistrate has given no valid reasons for refusing that request. It may be that this woman's evidence would have entirely satisfied the Magistrate as to the facts of the case, or the Magistrate may come to the conclusion that the allegations made by the accused in his defence are wholly false and that he has aggravated his position by putting forward these allegations and dragging a respectable woman into Court on the strength of them.

On the other hand, if the Magistrate finds the facts to be as alleged by the accused, the case should be decided on the principles of law laid down in the rulings to which we have referred, including the decision of this Court in the case of *Gaya Bhar v. Emperor* (1), from which if the principles laid down are properly limited and understood, we see no reason to dissent. We set aside the conviction and sentence in this case, but we do not acquit the accused Chhote Lal of the offence charged. On the contrary we direct the Magistrate to proceed with the trial, to inquire into the truth or otherwise of the defence set up and to pass such orders in the case as appear to him correct and appropriate.

Walsh, J.—I agree. What I propose to say on the question of law referred to us covers this case and also *Criminal Reference No. 837 of 1917, Lala v. Emperor* (6) before us for orders. I think it is a question of fact in each case. As Bowen, L. J., once said: "The state of a man's intention is as much a question of fact as

(3) [1895] 22 Cal. 391.

(4) [1895] 22 Cal. 994.

(5) [1902] 26 Bom. 558.

(6) [1918] 44 I. C. 35.

the state of his digestion" and the real question of law is whether, when there has been a conviction, there is any evidence of intention justifying the conviction. There is no conflict between the reported cases and I venture to sum up the result of them in this way. They come to this: that there is an invitation, or complicity by the woman, combined with an intention to preserve strict secrecy; then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused, then his act becomes a direct defiance of an express order, and it is impossible to say that you cannot infer from it an intention to annoy the author of the order. I think this is what has already been established by the decided cases. I agree with the decision of Knox, J., in *Mulla v. Emperor* (2) that a man found inside the complainant's house, who makes no statement of his reasons for being there or gives an explanation which is demonstrably false is clearly liable to be convicted on the ground that the burden of proof lies upon him and he has not discharged it. I do not understand that Sunder Lal, J., differed from that decision. On the contrary he seems to have agreed with it. Sunder Lal, J., held in *Gaya Bhar v. Emperor* (1) that mere knowledge, on the part of the accused, that he is likely to cause annoyance is not sufficient, and in coming to that conclusion he merely followed the case of *Queen Empress v. Rayapadayachi* (7), where it was held that although a man may know that his act is likely to cause annoyance it does not necessarily follow that he does the act with intent to annoy. And so far I think Sunder Lal, J., and the Madras High Court were really giving effect to the absence from this section (S. 441) of the words found in a cognate section, namely S. 297, where the knowledge that the feelings of a person are likely to be wounded, is one of the ingredients of the offence. This view is borne out by the decision in *Emperor v. Lakshman Raghunath* (5) to which my brother Piggott has already referred. In that case there was a distinct prohibition. The accused only wanted to get at their judgment-debtor and trespassed upon the complainant's house in order to do it. Some people might be annoyed by that

while some people might not mind it and an enemy of the judgment debtor certainly would not. But in the particular case the complainant forbade them to do it and it was held, and I agree with the decision, that in the face of his order directly forbidding them, an offence was committed within this section. There is a passage in that judgment which I adopt:

"When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret), there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result."

Regard must obviously be had to all the circumstances of the case. It may sometimes happen, I suppose, in this country as in others, that a man who is making love to another man's wife is doing it not merely with the tacit approval of the husband but as the result of conspiracy, if I may use the word between the husband and the wife to enable the wife to get away from the husband, and find a protector. Such cases are not unknown. In such a case the man might not know that his visits were approved by the husband and might think that he was successfully carrying on a secret intrigue, the truth being that the husband was assisting the wife all the time. I take it that no Court ought to find if those facts were established, and although the man complained against himself might have thought that his conduct was likely to annoy, that he had any intention of annoying the husband. I agree with the view taken by the learned Sessions Judge of Cawnpore in the case which is before us, Reference No. 837 of 1917 (*Lala v. Emperor* (6),) that if the accused knew that he had been expressly prohibited from entering the house by the uncle, it is legitimate to infer that he intended to annoy by persisting. Another example is that of a son in disgrace who persists in entering his father's house after a direct prohibition. I think this feature of the case in Reference No. 837 of 1917 just marks the dividing line between the two cases. I entirely agree with the order proposed in the case before us. The facts must be ascertained before the final decision can be arrived at.

V.B./R.K.

Conviction set aside.

(7) [1896] 19 Mad. 200.

A. I. R. 1919 Allahabad 252

WALSH AND RYVES, JJ.

Sukhu Koeri—Plaintiff—Appellant.

v.

Ram Lotan and others—Defendants—Respondents.

Second Appeal No. 704 of 1917, Decided on 13th June 1919, against decree of Sub-Judge, Jampur, D/- 6th March 1917.

Civil P. C. (1908), O. 17, R. 3—Party unable to proceed with case—Court should dispose of case on materials before it.

Where a litigant finds that he is unable from any cause to proceed further with his case, it is the business of the Court to dispose of the case upon the materials before it and not to dismiss it for default. [P 253 C 2]

B. E. O'Connor and Gokul Prasad—for Appellants.

Iqbal Ahmad, Mukhtar Ahmad and P. L. Banerji—for Respondents.

Judgment.—This case seems to be a chapter of obstinacy and misfortune. It is difficult to imagine it happening in any other country and one is not surprised that the Code, which in some respects has gone out of its way to provide elaborate provisions for default, failure to appear and so forth, has not foreseen what in fact happened in this particular case in the year 1916, and there is really nothing to guide the Courts in the present position. But every Court has inherent power, so far as it is not limited and prohibited by express provisions, to do what is right to both parties when there has been some failure or miscarriage, and to impose appropriate terms where that failure or miscarriage is clearly shown to be the fault of one party so that any injury to the other party may be avoided. The plaintiff filed this suit some time in the month of February 1916 making a claim which in substance turned upon the question whether he was a member of a joint or separate Hindu family, which does not in itself seem an extremely difficult point for a man to explain to a Judge in person.

A written statement was put in and either in July or September, we have it under the Munsif's own signature that it happened in July, the plaintiff went into the box apparently at that time being looked by a pleader and told his story with apparent conciseness and clearness and was partially cross-examined by the pleader for one of the other defendants. From that it must be inferred that at any rate up to that stage the plaintiff had

a bona fide belief in his own case which he wished to pursue. The cross-examination was not completed apparently, judging from the Munsif's notes, by arrangement between the pleaders. Therefore it may be assumed that the plaintiff's own evidence was not completed to suit the convenience of the pleaders on both sides. The 22nd September 1916 was fixed for the renewed hearing.

The plaintiff on that occasion appears to have been in a double difficulty. His pleader was absent and some of the witnesses who had been summoned were not in attendance. The Court treated him with consideration. It gave him time till next day. It told him to go on with such witnesses as were present and to arrange to summon others by warrant at a fresh date to be fixed for their appearance. The adjournment for the next day was clearly to enable the plaintiff to provide himself with another pleader or make arrangements for conducting the case. On the next day he was present in person. He said that he had secured a vakil who had a criminal case pending against him. Whether that was a moral objection to the vakil or a physical objection in the sense that his bodily presence was required elsewhere does not appear very clearly, but the net result was that the plaintiff was confronted with the choice of going on as best he could without any legal assistance. Here he seems either to have lost his head or to have shown unnecessary obstinacy. It would probably have been better if he put his witnesses in the box, but he declined either suggestion. He did not, in our opinion, withdraw the suit but merely confessed his inability to go on any further. The position at that stage was just as though any gentleman of the Bar arguing a case before one of us suddenly sat down; it would be our business to deliver judgment. And if a litigant finds himself unable to proceed further, we think, that it is the business of the Court to dispose of the case on the materials before it, and that the learned Munsif who obviously was in considerable difficulty at this series of misfortunes was wrong in saying that the plaintiff did not want to prosecute the case. That was just what he did, but he did not wish to do it in the way in which he was invited to do. We think the Munsif had no alternative but to dispose of the case. The plaintiff

at that stage put himself hopelessly in the wrong.

After the Munsif had treated him with consideration and given him every opportunity, the plaintiff declined to call the witnesses who were available and even to engage another vakil. The Munsif in disposing of the case purported to dismiss it for default. An appeal was brought from that judgment and the learned Subordinate Judge practically adopted what the Munsif had done and even put it in stronger language that the plaintiff had abandoned his suit. As we have said, we cannot agree that this is the correct view. This appeal is now brought by the plaintiff who wants his case heard. An objection is raised to the appeal upon the ground that the suit was dismissed for default and that no appeal lies from such order either to the lower appellate Court or to ourselves. So far as that is concerned, the nearest rule applicable to the circumstances we have described is O. 17, R. 3, Civil P. C., and there is a decision binding upon us that where that rule applies, the duty of the trial Court is to dispose of the suit on the merits and not to dismiss it for default: *Badam v. Nathu Singh* (1). And the view taken in that case at any rate is that the unsuccessful party has a right of appeal for what it is worth. We therefore hold that we are bound to entertain this appeal. On the other hand there being no express rule exactly applicable, we think we ought in the exercise of our inherent jurisdiction to do what appears to us most nearly to meet the ends of justice. As we have said, the plaintiff was entirely at fault and the defendant had a right to have the suit disposed of on the merits.

We think the proper order to make under the circumstances is that the plaintiff shall, at any rate as a condition of having his suit tried at all, put the defendant in the same position as if this miscarriage had never occurred, that is to say, he must pay in cash into the Court of the Munsif a sum of Rs. 369-2-9, representing the costs due to the three defendants in the two Courts as set out in the decree of the lower appellate Court, unless of course any of these costs have already been paid, in which case credit for such payment must be given. He must also deposit in cash or security, sufficient in the opinion of the Munsif, a

(1) [1903] 25 All 194.

sum of Rs. 250 as security for the future costs of the suit in the trial Court only, that is to say, whatever the costs in the trial Court for the further hearing may be. The plaintiff will be entitled to any surplus between that amount and the sum of Rs. 250. Upon the payment of the first sum in cash into the Munsif's Court and the deposit of the second sum either in cash or in some other form of security by way of security for the future costs within three months from this date, we allow the appeal, set aside the order of both the Courts below and remand the case under O. 41, R. 23, Civil P. C. to the Court of first instance through the lower appellate Court, with directions to re-admit the suit, under its original number in the register of civil suits and proceed to determine it according to law. The costs of this appeal will abide the ultimate result of the suit, including fees on the higher scale. If at the expiration of three months those sums have not been either paid or deposited, the plaintiff's suit and this appeal will stand dismissed with costs including in this Court fees on the higher scale.

V.B./R.K.

Case remanded.

A. I. R. 1919 Allahabad 253

PIGGOTT AND WALSH, JJ.

Khalilulrahman — Defendant — Appellant.

v.

Gokul Chand — Plaintiff — Respondent.

Execution First Appeal No. 72 of 1918, Decided on 11th March 1919, against decision of Addl. Sub-Judge, Moradabad, D/- 26th January 1918.

Interest—Decree awarding interest till realization—Property sold in execution—Interest is recoverable till date of confirmation.

Where property is sold in execution of a decree, which awards interest until realization, the decree-holder is entitled to interest for the period intervening between the date of the sale and the date of confirmation of the sale. [P 254 C 2]

G. Agarwala—for Appellant.

Peare Lal Banerji—for Respondent.

Judgment.—This is an appeal by a judgment-debtor in an execution case. It is sufficient to say that a mortgage decree for a very large sum of money was passed and that under this decree the property of the judgment-debtor in four villages was ordered to be sold. There were certain objections raised in the course of the preparation of the sale proclamation and the judgment-debtor, being dissatisfied

with the decision of the execution Court on these points, filed an appeal to this Court, which was registered as Execution First Appeal No. 329 of 1917 and disposed of on 21st May 1918. During the pendency of this appeal the sale of one of the properties in question, namely the rights of the judgment-debtor in a village called Dhoti, was ordered to be stayed for a time. The other three properties were sold and purchased by the decree-holder and by other outside auction-purchasers. The order for stay in respect of village Dhoti having been discharged, the decree-holder applied for the sale of that property also. Once again the judgment-debtor raised various objections regarding the sale proclamation proposed to be issued by the Court and, these having been overruled, he has brought this present appeal. The property has, in the meantime, been sold for a substantial sum. After this appeal had been filed, that is to say, on 21st May 1918 the order of this Court on Execution First Appeal No. 329 of 1917 was passed and by that order the appeal of Khalil-ul-Rahman, judgment-debtor, was dismissed, with the remark that the Court found no force whatever in the said appeal. In the meantime, the rights of Khalil-ul-Rahman in the village of Dhoti have been brought to sale under a simple money decree and have been purchased by one Makhan Lal, who is the appellant in another appeal now pending before us. Khalil-ul-Rahman therefore has no interest whatever in the property in the village of Dhoti, to which this appeal relates, and it is at least open to argument, whether he has any locus standi to take objections to the sale proclamation or to maintain this present appeal.

The most substantial point raised by him is as to the description of the property in the village of Dhoti entered in the sale proclamation. It will be more convenient to discuss this point in the connected appeal filed by Makhan Lal, but so far as Khalil-ul-Rahman is concerned, it is certainly concluded against him by the order of this Court on Execution First Appeal No. 329 of 1917. In that appeal the same identical point regarding the description of the share in village Dhoti in the sale proclamation was taken which it is sought to raise in the present appeal, and the Court overruled it, along with all the other pleas

taken in the memorandum of appeal, as having no force whatever. Another point raised is as to the sum for which execution has been taken out. The decree-holder admitted that, by reason of the auction sales which had taken place prior to the sale of Dhoti, his decree had been so far satisfied that only a sum of Rs. 15,120-4-0 remained due. On this he claimed interest, as allowed by the decree itself, amounting to Rs. 327-9-0. These two items are not in dispute. The decree-holder however claimed a further sum of Rs. 320. This represents interest on the rest of the mortgage debt for a period between 22nd July 1917 and 17th September 1917. The former of these dates is the date of the sale of the property of Khalil-ul-Rahman in villages Fazilpur and Shahjahanpur. The second of these dates is the date of the confirmation of the said sale. The proprietary rights in Shahjahanpur were purchased by an outsider and, in view of the fact that the decree-holder was entitled to interest until realization, and that he could not have withdrawn the money from the Court until the sale had been confirmed, he seems clearly entitled, as the Court below has held, to his interest up to the date of confirmation of sale.

As regards the village Fazilpur, which was purchased by the decree-holder himself on a bid of Rs. 29,000, the position is not quite so clear. Presumably the interest due on Rs. 29,000 for the period between 22nd July 1917 and 17th September 1917 would amount to Rupees 265-13-4 and the objection which we have to determine must be taken to be limited to this amount. When the decree holder bid at the auction sale up to the sum of Rs. 29,000, he in fact asked the Court to record the satisfaction of his decree to that extent. But as the Court below has pointed out, satisfaction of the decree to that extent could not be entered until the sale had been confirmed. It is quite true that under S. 65, Civil P. C., the auction purchaser's title to property sold at a public auction dates back, once an order of confirmation has been passed, to the date on which the sale was held; but this does not seem to affect the question of the right vested in the decree-holder by reason of his being allowed interest until realization under the terms of his decree. The fact that a decree, the satisfaction of which has

resulted from the decree-holder himself bidding the full amount of the same at the execution sale, is not actually satisfied until the sale has been confirmed, was pointed out by the learned Judges of the Bombay High Court in the case of *Ganesh v. Purshottam* (1) and was there made the ratio decidendi of an important question affecting the rights of decree-holders who had purchased under their own decree. The principle involved seems to be applicable to the present case also and the decision of the Court below on the point must be affirmed. For all these reasons we dismiss this appeal with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1909] 33 Bom. 311=1 I. C. 106.

A. I. R. 1919 Allahabad 255 (1)

RICHARDS, C. J. AND RAFIQUE, J.

Jugal Kishore and another—Appellants.

v.

Bankim Chandra—Respondent.

First Appeal No. 184 of 1918, Decided on 25th February 1919 from an order of Dist. Judge, Jhansi.

Provincial Insolvency Act (1907), Ss. 31 and 32—Mortgagee of insolvent's property—Position of, stated.

A mortgagee of the property of an insolvent is not a person proving in the bankrupt's estate; he is a secured creditor and is entitled to receive out of the sale of the mortgaged property his principal and interest at the contractual rate up to date of payment and costs. [P 255 C 1]

Pearey Lal Banerji—for Appellants.

Sital Prasad Ghosh—for Respondent.

Judgment.—This appeal arises out of insolvency proceedings. The appellants are mortgagees of the property of the insolvent. The mortgaged property has been taken possession of by the receiver and sold. The Court below thought that the mortgagee was only entitled to interest at the contractual rate up to date of the insolvency. In our judgment the Court below was quite wrong. The mortgagee, according to law, is clearly entitled to receive out of the proceeds of the sale of the mortgaged property his principal, interest and costs. He is entitled to receive interest up to the date of payment. A mortgagee as mortgagee is not a person proving in the bankrupt's estate, he is a secured creditor and entitled to look to his security to realize the amount of the debt secured thereon. We do not think that the cases cited by the learned District Judge have any bearing on the

question involved in this appeal. We allow the appeal, modify the order of the Court below by directing that the mortgagees, appellants here, must be paid the principal and interest (the latter calculated up to the date of payment at the contractual rate mentioned in the mortgage). As the mortgagee has had to appeal here, we think that to this sum should be added the costs of the appeal necessarily incurred in the Court below. These sums also should come out of the proceeds of the sale of the mortgaged property. As stated above, the appellants will have their costs in this Court.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 255 (2)

RICHARDS, C. J. AND RAFIQUE, J.

Mt. Ilahi Jan—Plaintiff—Appellant.

v.

Mohammad Ishaq Khan and others—Defendants—Respondents.

Second Appeal No. 1068 of 1917, Decided on 19th February 1919, from decision of Addl. Judge, Saharanpur, D/- 7th May 1917.

(a) Mahomedan Law—Pre-emption—Custom prevailing in village—Simultaneous right under Mahomedan law cannot possibly exist Pre-emption—Right, if.

If there is a custom of pre-emption prevailing in a village it is not possible that there should be at the same time a right under the Mahomedan law. On the other hand, if there is no custom of pre-emption, and there merely was at one time an arrangement between the cosharers which has come to an end with the settlement, there is no reason why the cosharers would not at the end of the settlement be entitled to re-assert their rights under the Mahomedan law, provided that they had such rights before the contract.

[P 256 C 1]

(b) Mahomedan Law—Pre-emption—Law applies to zemindari property.

The Mahomedan law of pre-emption extends to large estates including zamindari property.

[P 256 C 2]

K. N. Katju for S. M. Sulaiman—for Appellant.

Muhammad Ishaq Khan—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The first Court decreed the plaintiff's suit. The lower appellate Court dismissed the suit. The plaintiff alleged in the plaint that she, being a cosharer in the same khewat and patti, fulfilled the necessary conditions of pre-emption and persistently asked the defendants to make the property over to her. This is evidently an allegation of a right of pre-emption under the Maho-

medan law. Para. 5 goes on to allege that even apart from this there was a custom of pre-emption prevailing in the village and that under that custom she had a right. The vendees denied the existence of a custom, denied that the plaintiff had any right of pre-emption and pleaded in a very specific manner that before the sale the plaintiff was informed by means of a written notice of the intended sale, and that she refused to buy on account of her being destitute of means. The Court of first instance held that the custom had been proved and further that the formalities of Mahomedan law had been duly performed. The lower appellate Court considered that the plaintiff could not fall back upon Mahomedan law of pre-emption, because she had alleged a right by custom and further once any right of pre-emption existed either by custom or by arrangement between the cosharers, there never could be any right under the Mahomedan law, and on this ground dismissed the plaintiff's suit. It did not consider whether or not the formalities required by the Mahomedan law had been duly performed by the plaintiff. It held however that no custom was proved. The plaintiff comes here in second appeal contending that the Court below ought not to have dismissed her claim on the ground that the plaintiff could not claim under Mahomedan law. We think that there is considerable force in this contention.

The plaintiff had put her rights under the Mahomedan law as her first claim to pre-emption. No doubt if there is a custom of pre-emption prevailing in a village it is not possible that there should be at the same time a right under the Mahomedan law. On the other hand, if there is no custom of pre-emption, and there merely was at one time an arrangement between the cosharers which has come to an end with the settlement, we see no reason why the cosharers would not at the end of the settlement be entitled to re-assert their rights under the Mahomedan law, provided that they had such right before the contract. It is contended on behalf of the respondents that there is no right under the Mahomedan law to pre-empt property of the nature of zamindari property, and possibly in the absence of authority a good deal might be said for this contention.

It has however been held by a Bench of this Court and in some other Courts in India that the Mahomedan law of pre-emption does extend to large estates which of course, includes zamindari property, and we think in a small case like the present we should hesitate to send the case to a larger Bench. We think therefore that assuming that the plaintiff duly performed the requirements of the Mahomedan law we should grant her a decree in the present suit.

We have already mentioned that the lower appellate Court did not decide whether the formalities of the Mahomedan law had or had not been complied with but as all the materials are on the record and as we think it inadvisable that we should put the parties to further expense by referring an issue we have determined to decide the issue ourselves, and for that purpose we have considered the evidence on the record. The plaintiff did not come into the witness box to depose that she had performed the talabs. Evidence was given on her behalf to the effect that a man of the name of Daulat (who was a tenant) was the first to inform her of the sale and that thereupon she at once claimed pre-emption. Daulat has not been called. According to the evidence given on behalf of the plaintiff her attorney made the second demand she being a pardanashin lady. As against this evidence the vendees produced evidence to show that such demands were never made and that before the sale a written notice was sent by post addressed to the plaintiff pointing out that as she was a cosharer with the vendor she was being given notice that the property was being sold and asking her whether she wished to buy. Certificate of the posting of the letter so addressed was filed and secondary evidence of the contents of the notice was admitted. The plaintiff never denied that she had received this notice, she gave no evidence at all and the Court of first instance seems not to have doubted that the notice was in fact sent and received. Evidence was further given that not having received any answer to the notice the purchaser of the property visited the lady's house. He could not of course enter the house because the lady was pardanashin but he deposes to a conversation with her from behind the parda and that she said that she was a widow and too poor

to purchase. The Court of first instance does not in so many words say that it believes the witnesses on behalf of the plaintiff although no doubt it finds the issue in favour of the plaintiff.

We have to consider now which of these two stories is the most probable. The Court of first instance as we have already said does not seem to have doubted that the notice to which we have referred was in fact sent and received. It may be that the Court was quite right in holding that this notice was not sufficiently explicit about price etc., to debar the plaintiff's right: but the receipt of this notice by the plaintiff if in fact it was received has a very strong bearing on the probability or improbability of her having made the demands required by Mahomedan law. If the plaintiff received that notice and she was anxious to purchase the property it is almost certain that she would have given some reply either orally or in writing. She did neither. If the plaintiff was really anxious to buy this property and able to pay for it when it was being sold it would not be probable that she would have waited for 11 months before instituting the suit. Presumably people who are able to purchase a property anxious to purchase it and have a right to purchase it, take steps to assert their right at the earliest possible moment. It is said that by inserting an exorbitant price in the sale deed difficulties were placed in the plaintiff's way.

No doubt if the plaintiff had to pay the exorbitant price this would be a difficulty. But there was nothing to prevent her instituting the suit alleging and proving that the price was exorbitant if in fact it was. It thus appears that the story told by the defendant is corroborated by the post office certificate of the posting of the notice and the secondary evidence of the contents of the notice. Their story is also corroborated by the surrounding circumstances, and in particular by the delay which has taken place in the institution of the suit. We do not believe the evidence of the plaintiff's witnesses that the demands were made. We do not believe that she was in a position to buy, or that she was anxious to buy the property at the time it was being sold. We therefore decide this issue against the plaintiff.

It was lastly contended on behalf of the respondents that a custom of pre-

emption was proved. The entry in the *Wajibularz* on the face of it shows that it was not a record of a custom. It was the record of the wishes of the co-sharers. The lower appellate Court has found that the custom does not exist and we think that it was quite justified in coming to this finding. For the reasons we have stated we dismiss the appeal with costs including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 257

KNOX, J.

Tejpal—Plaintiff—Appellant.

v.

Jhagru and another—Defendants—Respondents.

Preliminary objection in Second Appeal No. 280 of 1919, Decided on 25th April 1919.

Government of India Act (1861), S. 101—High Court—Constitution when in accord with S. 101 stated.

Where a High Court is so constituted that not less than 1/3rd of the Judges are Barristers and not less than 1/3rd are members of the Covenanted Civil Service, the constitution is in accord with S. 101. [P 257 C 2]

Tej Bahadur Sapru and Lakshmi Narayan raised the objection.

Judgment.—A preliminary objection was raised when this second appeal was called on for hearing. It was to the effect that this Court as at present constituted is not competent to hear this or any appeal. The Court consists to-day of an Acting Chief Justice and five Judges, of whom two are Barristers, two are members of the Covenanted Civil Service and one is a person who has held judicial office not inferior to that of Principal Sudder Ameen for a period of not less than five years. As not less than 1/3rd of the above-mentioned Judges are Barristers, and not less than 1/3rd are members of the Covenanted Civil Service, this constitution is in accord with the provisions contained in the Indian High Courts Act, 1861, and the directions of the Letters Patent issued by Her Late Imperial Majesty under date the seventeenth day of March in the year of our Lord one thousand eight hundred and sixty-six. The Indian High Courts Act, 1861, was repealed by the Government of India Act, 1915, and from the first day of January 1916 under the provisions of S. 101 of this last Act each High Court

shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint: provided that the maximum number of Judges shall be twenty.

It was also enacted that a Judge of a High Court must be: (a) a duly qualified Barrister, (b) a duly qualified member of the Indian Civil Service, or (c) a person having held judicial office not inferior to that of a Subordinate Judge for a period of not less than five years; Provided that not less than 1/3rd of the Judges including the Chief Justice must be such Barristers and that not less than 1/3rd must be members of the Indian Civil Service. It is not necessary for the purposes of this objection to set out the qualifications or the provisions relating to Pleaders, as this objection does not challenge the constitution of the Court on this ground. There are not and never have been any Additional Judges appointed to this Court. In 1908 while the Court consisted of a Chief Justice and five puisne Judges His Majesty appointed the late S. Karamat Hussain to be a puisne Judge of the Court, thereby raising the strength of the Court to a Chief Justice and six puisne Judges, and on the retirement of the late S. Karamat Hussain His Majesty in 1912, was pleased to appoint Rafique, J. to be a puisne Judge of the Court. On the basis of these appointments it is contended that His Majesty has thought fit that this High Court shall consist of a Chief Justice and six puisne Judges. Further that owing to the retirement of Sir Henry Richards the Court consists to-day only of an Acting Chief Justice and five puisne Judges and of the seven Judges necessary to constitute the Court less than 1/3rd, to wit only two, are duly qualified Barristers.

Accepting the contention of the learned Advocate, it will be seen that save as to the number of Judges the constitution of the Court is in harmony with the provisions of the Government of India Act, 1915. So far as the number of Judges is concerned, the contention now raised is in spirit and principle exactly the same as was raised in *Lal Singh v. Ghansham Singh* (1). It was fully considered by a Full Bench of this Court and overruled. By this decision I am bound and I may add that I fully concur with that was

(1) [1887] 9 All. 625 (F.B.).

laid down in that case by Sir John Edge. I overrule the objection and hold that the Court has jurisdiction to hear this appeal.

V.B./R.K.

Objection overruled.

A. I. R. 1919 Allahabad 258

PIGGOTT, J.

Mansoor Husain—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 88 of 1919, Decided on 7th April 1919, against order of Sess. Judge, Bareilly, D/- 13th December 1918.

(a) Penal Code (1860), Ss. 448, 451 — Offence under S. 451—Offence of simple house trespass must first be proved and then it must be shown that it was committed to commit offence punishable with imprisonment.

In order to constitute an offence under S. 451 all the facts necessary to constitute the offence of simple house trespass, punishable under S. 448 of the Code, must first be established and it must further be shown that the house-trespass was committed in order to commit an offence punishable with imprisonment such as theft, mischief etc. Where such proof is wanting a conviction under S. 451 of the Code is bad in law. [P 259 C 1]

(b) Criminal P. C. (1898), S. 439 — High Court satisfied that conviction is bad in law — It is not bound to consider whether conviction of some lesser offence might or might not be recorded.

A High Court possesses a very wide discretion under S. 439, Criminal P. C., but when the Court is satisfied that a conviction as recorded in any case coming before it in revision is bad in law it is not necessarily bound to go further into the question whether upon the facts established by the evidence a conviction of some lesser offence might or might not be recorded. [P 259 C 2]

(c) Criminal P. C. (1898), S. 439 — Order by Court inferior to Sessions Judge or District Magistrate — Person dissatisfied with order should approach Sessions Judge or District Magistrate before invoking jurisdiction under S. 439.

It should be made a rule of practice that a person dissatisfied with any order or proceeding in a Court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate, should in the first instance obtain the opinion of the Sessions Judge or of the District Magistrate on the matter in question before invoking the revisional jurisdiction of the High Court. [P 160 C 1]

Iqbal Ahmad—for Applicant.

Sital Prasad Ghosh—for the Crown.

Judgment. — The question of law raised by this application is whether on the facts found by the Courts below, Mansoor Husain has or has not been

rightly convicted of an offence punishable under S. 451, I. P. C. I hold that he has not. In order to constitute an offence under S. 451 aforesaid the prosecution must first establish all the facts necessary to constitute the offence of simple house trespass, punishable under S. 448, I. P. C., and must then satisfy the Court that in the particular case before it the house trespass was committed in order to the committing of an offence punishable with imprisonment. The offence in question must obviously be something over and beyond the house-trespass itself, otherwise every case falling under S. 448, I. P. C., would also fall under S. 451, I. P. C. I do not say that it is absolutely necessary for a conviction under the latter section that the prosecution should be able to satisfy the Court as to the particular offence punishable with imprisonment which the accused intended to commit but facts must be proved of such a nature as to justify the inference that some offence punishable with imprisonment was intended over and above the house-trespass itself. In the present case the Courts below have not found and it does not seem to have been suggested either before the trial Court or in the Court of Appeal that the house-trespass alleged was committed in order to the committing of a further offence either of theft (S. 379, I. P. C.), or of mischief (S. 426, I. P. C.) in respect of the bricks which the accused is alleged to have thrown from the verandah of a ruined shop into the street. The accused has not been tried on the basis of any such suggestion and I am not prepared to reconsider the effect of the evidence on the record upon this basis. The finding is that the accused intended to intimidate, insult or annoy the complainant. That finding as it stands would warrant a conviction under S. 448, but not a conviction under S. 451, I. P. C. I do not say that it might not be possible upon a proper state of facts, to invoke the aid either of S. 506, or of S. 504, I. P. C., so as to bring an act of house-trespass under the purview of S. 451, I. P. C. but I am satisfied that the Courts below have not attempted to do this in the present case and I do not think they could have done so upon the evidence on the record.

From these considerations it follows that the conviction as regarded is bad in

law and cannot be upheld. The discretion of this Court in dealing with a case under S. 439, Criminal P. C., is a very wide one. I have no doubt whatever that it would be within my discretion, while setting aside the conviction affirmed by the Courts below to convict Mansoor Husain of an offence punishable under S. 448, I. P. C., and either to maintain the sentence passed by the Courts below or to reduce that sentence in such manner as might appear to me suitable. I hold however that it is equally within my discretion to decline to do this. I could if necessary, quote ample precedent for the view that when this Court is satisfied that the conviction as recorded in any case coming before it in revision is bad in law it is not necessarily bound to go further into the question whether upon the facts established by the evidence a conviction of some lesser offence might or might not be recorded. It is a matter of judicial discretion to be exercised in each case according to the view which the Court may take of the requirements of justice. In the present case I am content to say that upon an examination of this record I am not so satisfied that Mansoor Husain should be convicted of an offence of simple house-trespass, punishable under S. 448, I. P. C., as to feel it incumbent on me to direct his conviction under the said section.

The result is that I set aside the conviction and sentence in this case and direct that the fine, if paid, be refunded. Before I heard this application on the merits my attention was drawn to the fact that the applicant had come to this Court in revision when he might lawfully have filed an application in revision in the Court of the Sessions Judge. I am fully aware that there is a rule of practice in this Court according to which the Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate. I believe this rule to be a very reasonable one and one to be observed in the interests of justice. It would be within the power of this Court to call for every record of every criminal case decided by every Court subordinate to it for the purpose as laid down in S. 435, Criminal P. C., of,

"satisfying itself as to the correctness, legality or propriety of any finding sentence or order

recorded, or passed as to the regularity of the proceedings."

It is obviously advisable that this Court should make it a rule of practice that a person dissatisfied with any order or proceeding in a Court of inferior jurisdiction to that of the Sessions Judge, or of the District Magistrate, should in the first instance obtain the opinion of the Sessions Judge or of the District Magistrate on the matter in question, before invoking the jurisdiction of this Court. Such a procedure tends to prevent the time of this Court from being wasted over frivolous or unsustainable applications. It also ensures the further advantage that if the matter eventually comes before this Court it comes upon a record containing an expression of opinion by a Court of superior jurisdiction such as that of the Sessions Judge or of the District Magistrate. I am further of opinion that if such a rule of practice is once laid down it ought to be enforced evenly and without making capricious exceptions in favour of particular applicants. In the present case there had been a trial in the Court of a Magistrate of the second class and an appeal to the Court of the District Magistrate. I would not go so far as to hold that the District Magistrate, even when sitting as a Court of appellate jurisdiction is not a Criminal Court "inferior" to that of the Sessions Judge within the meaning of S. 435, Criminal P. C. but I am not prepared to say that the rule of practice above referred to must necessarily or invariably be enforced in such manner as to encourage interference on the part of the Sessions Judge with orders passed by the District Magistrate in the exercise of his appellate jurisdiction. At any rate, I regard the circumstances above stated as affording in themselves a reasonable ground for making an exception to the general rule of practice in question.

In the present case the application in revision was presented to myself personally, and I admitted it. I hold that my order of admission even though passed ex parte, was sufficient to take this case out of the operation of the rule of practice in question. The order of admission was an order under S. 435, Cl. 1, Criminal P. C., it was within the discretion of this Court and once passed, it was not open to any party concerned to

call it in question. In conclusion I have one comment to make regarding a small matter of procedure in the record before me. The case obviously came before the District Magistrate of Bareilly as a Court of appellate jurisdiction but in the record as prepared the Court which passed the order is described as the "Court of the Collector of Bareilly." In the present instance the mistake was of no practical consequence but I have known cases in which real difficulty has been caused by uncertainty as to the capacity in which an officer holding the position of Magistrate and Collector of a District has dealt with a particular matter. In any case it is a slovenly thing to endorse an appellate judgment of a District Magistrate under the heading of "the Court of the Collector."

V.B./R.K.

Conviction set aside.

A. I. R. 1919 Allahabad 260

TUDBALL, J.

Ghulam Jilani and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 467 of 1918, Decided on 4th September 1918, from an order of Dist. Magistrate, Meerut.

Criminal P. C. (1898), S. 109—Order under S. 107—There must be good basis of fact—Mere suspicion is not enough.

The only persons to whom the provisions of S. 109, Criminal P. C., apply are those who take precautions to conceal their presence within the local limits of a Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves. To justify an order under that section there must be a good basis of fact; mere suspicion is not enough.

Three respectable citizens of Delhi were met at night by the police between Meerut City and Meerut Railway Station and a burglar's jemmy was also found somewhere near on the ground:

Held: that these facts did not justify the passing of an order under S. 109, Criminal P. C.

[P 261 C 1]

*Satya Chandra Mukerji—*for Applicants.

Judgment.—This is an application in revision in respect of an order passed by the District Magistrate of Meerut on an appeal preferred from an order of a Magistrate of the First Class calling upon the applicants to provide security to be of good behaviour in a matter which arose under S. 109, Criminal P. C. As the judgments of the Joint Magistrate and the District Magistrate show, the three present appellants were met at night

time in the company of two other persons on the road at Meerut between Meerut City and the railway station. It appears that the police had received certain information to the effect that men of bad character were about to commit a raid upon the town. They made preparations to counteract this, and on the night in question they received information that the proposed raid had been postponed. The three present applicants were met by a party of police that same night on the road as mentioned above. Apparently on the ground somewhere close to them a burglar's jemmy was found. The applicants gave an explanation of themselves and as a matter of fact it has been established that they are well-to-do and respectable residents of the City of Delhi. The other two persons who also were met are also reported by the police at Delhi to be persons of decent character. In spite of this information the District Magistrate has upheld the order of the Joint Magistrate. S. 109 enables the Magistrate mentioned therein to call upon certain persons to show cause why they should not be ordered to furnish security for good behaviour.

The persons contemplated in the section are persons taking precautions to conceal their presence within the local limits of such Magistrate's jurisdiction or persons who have no ostensible means of subsistence and who cannot give a satisfactory account of themselves. The present applicants clearly do not come within Cl. (a), as it was not alleged that they were taking precautions to conceal their presence with a view to committing an offence. They could only have come in under Cl. (b) as persons who could not give a satisfactory account of themselves. But as the District Magistrate's judgment on appeal shows, the account they gave of themselves was correct and the police of Delhi have reported that these three present applicants are persons who are well-to-do and of good character. In these circumstances I do not think that S. 109 can apply to them and that the order passed has been passed more on suspicion than on any good basis of fact. I therefore allow the application and set aside the order of the Joint Magistrate, dated 31st January 1918. The security bonds, if furnished, will be discharged.

V.B./R.K.

*Application allowed.***A. I. R. 1919 Allahabad 261**

RICHARDS, C.J. AND BANERJI, J.
Ram Lal—Plaintiff—Appellant.

v.

Mt. Tamkin Bano and others—Defendants—Respondents.

First Appeal No. 67 of 1917, Decided on 20th January 1919, from decision of Sub-Judge, Budaun, D/- 20th July 1916.

Registration Act (1908), S. 28—Property not belonging to executant included to give jurisdiction to Registrar—Registration is invalid.

Where an item of property which does not belong to the executant of a deed and is not intended by the parties to be affected by the deed, is included in the deed merely for the purpose of obtaining registration of the deed in a district where no part of the property actually intended to be affected by the deed is situate, such registration is invalid and does not operate to confer any title. [P 262 C 1, 2]

Sital Prasad Ghose and Narain Prasad—for Appellant.

Ibni Ahmad, S. M. Sulaiman and Lakshmi Narain—for Respondents.

Judgment.—This appeal arises out of a suit brought on foot of two hypothecation documents. One was a mortgage pure and simple. The other was a security bond by which the executant undertook to guarantee the due payment of the amount of the mortgage and interest, to secure which he hypothecated certain property. The deeds are of even date, and the Court below granted a decree for the sale of the property mortgaged but dismissed the suit in so far as it sought the sale of the property which had been mortgaged by way of security. The defendants who were interested in this last mentioned property, consist of subsequent transferees and the heirs of the deceased executant. The Court below awarded three sets of costs to these defendants. The Court below found that one item of property which did not belong to the executant of the security bond was intentionally entered in order to enable the document to be registered at Budaun. The Court was of opinion that the executant had no interest in this property and that the mortgagee knew quite well that it was not intended that it should form any portion of the security. We see no reason to differ from the finding of the Court below on this question of fact. It seems to us highly probable that the object of entering this particular item of property was to enable the document to be registered at the Budaun Sub-District Registration Office. The principal mort-

gage, which we have already said was of even date, had to be registered in this office because the property comprised in it was situate in that Division. The property mortgaged by way of security was not situate in the same district. The item of property consists of a small strip of land, about 29 square yards, either adjoining or near the executant's house. It is significant that the property is not mortgaged as an appurtenance to the house, because the house was not mortgaged at all, and the probabilities are that this small piece of land was miles away from the villages shares in which were being hypothecated. The Court below considered under these circumstances that the security bond had not been duly registered and for this reason dismissed the suit so far as it related to the property comprised in this bond. It is unnecessary to state that it was necessary that this document in order to affect the property should be duly registered. S. 28, Registration Act provides that:

"Every document mentioned in section . . . shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate."

No portion of the property to which the document in question related was situated in the Budaun Sub-district except the piece of land to which we have already referred. It is contended that the inclusion of this piece of land, quite irrespective of the want of title of the mortgagor and the intention of the parties made the deed "relate" to this 29 square yards. We think that this contention is not sound. If neither the mortgagor, nor the mortgagee, intended that the piece of land should be mortgaged or form any portion of the security, then it seems to us impossible to contend that the document "related" to this little piece of land. In the case of *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1), where the facts were very much the same as they are in the present case, their Lordships of the Privy Council say at p. 989 (of 41 Cal.) of the report:

"But the point may be put in another way upon broader grounds. Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration

in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the registration law, and no registration obtained by means thereof is valid."

In our opinion in the present case this 29 square yards represents no property that the executant possessed, or intended to charge or that the mortgagee intended should form part of the security. A decision of this Court in *Mangali Lal v. Abidyar Khan* (2) is to the same effect. The only question which remains is the question of costs. The subsequent transferees we think are entitled to their costs—under the usual practice of this Court costs follow the result. With regard to the heirs of the executant the case stands on a somewhat different basis. We are perfectly satisfied that their predecessor-in-title was fully aware of what was being done and deliberately allowed the 29 square yards of land to be included in the security bond. Under the circumstances we think that the heirs of the executant of the security bond should bear their own costs here and in the Court below. The result is that we vary the decree of the Court below by directing that defendants 2 and 3 shall pay their own costs. In all other respects we confirm the decree of the Court below and dismiss the appeal. The respondents other than defendants 2 and 3 will have their costs of this appeal each having a separate set of costs. Costs in this Court will include fees on the higher scale. Defendants 2 and 3 will bear their own costs of this appeal.

V.B./R.K.

Appeal dismissed.

(2) [1917] 29 All. 523=41 I. C. 3.

A. I. R. 1919 Allahabad 262

KNOX, AG. C. J. AND BANERJI, J.

Hoti Lal—Defendant—Appellant.

v.

Chuttan Lal—Plaintiff—Respondent.

Letters Patent Appeal No. 82 of 1917, Decided on 13th May 1919, from judgment of Walsh, J., D/- 18th June 1917.

(a) *Agra Tenancy Act* (2 of 1901), S. 34—Possession as tenant without landlord's consent—S. 34 applies.

Section 34 applies only where a person is in possession as a tenant without the consent of the landlord.

(b) *Agra Tenancy Act* (2 of 1901), Ss. 33 and 34—Tenant agreeing to pay rent at a certain rate—S. 34 does not apply—Liability to pay rent is under S. 33.

Where a tenant agrees to pay rent at a certain rate, he is not in possession of his holding without the landlord's consent, and S. 34, has

(1) A. I. R. 1914 P.C. 67=23 I.C. 637=41 Cal. 972=41 I.A. 110 (P.C.).

therefore no application to his case. He is liable to pay the rent agreed upon by him under S. 33 of the Act. [P 263 C 1]

S. N. Sen—for Appellant.

S. C. Choudhri and *P. L. Banerji*—for Respondent.

Judgment.—An elaborate argument has been addressed to us in support of the appellant. We think the case may be decided upon a short and simple ground. The suit was not one either in form or in substance for determination of the rate of rent. The plaintiff clearly claimed arrears of rent at the rate mentioned in the plaint and he did so under S. 33, Agra Tenancy Act. The original holding of 55 bighas had been determined by proceedings for ejectment of the defendant from that holding. The plaintiff actually dispossessed the defendant from a large portion of the holding but as the land now in question was covered by rose plants the defendant was allowed to remain in possession first for the purpose of determining the compensation to be paid to him and subsequently as a tenant of that part of the holding. The defendant, who owned a share in the village, brought a suit against the present plaintiff for his share of profits. In that suit a question was raised whether the land in respect of which rent is now claimed was held by the defendant as khudkasht or as a tenant. The matter was referred to arbitration and the arbitrator held that he held the land as a tenant, the rent being Rs. 105 a year. Both parties accepted the award. So that it may be taken that they agreed that the land now in question should be held by the defendant as a tenant, he agreeing to pay a rent of Rs. 105 a year. This was the finding of the Court of first instance and that Court rightly decreed the plaintiff's claim. The lower appellant Court no doubt went into the question of the application of S. 34, Tenancy Act, to the present case. That section had nothing to do with the case, inasmuch as the defendant was not in possession as tenant without the consent of the plaintiff. We think that it must be taken, as the first Court found, that the parties agreed that the defendant should hold this land at a rent of Rs. 105 a year. Therefore under S. 33, Tenancy Act, he was liable to pay rent at that rate and the decree passed against him was, in our opinion, right and equitable. S. 35 on

which the learned advocate for the appellant relied, has no application to the present case. The original tenancy of 55 bighas came to an end and a new tenancy was created. We accordingly dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 263

RICHARDS, C. J. AND BANERJI, J.
Guddar Mal—Defendant—Appellant.

v.

Het Ram—Plaintiff—Respondent.

Second Appeal No. 1910 of 1916, Decided on 1st November 1918, from decree of Dist. Judge, Agra.

Allahabad High Court Rules (General Rules for Civil Courts Subordinate to High Court) Ch. 21, R. 1—Certificate of fees accompanied by Karinda is sufficient—Word "authorized" is redundant.

A certificate by a legal practitioner that he has duly received his fee, accompanied by the affidavit of a karinda of his client, that the fee has been duly paid, is a sufficient compliance with R. 1, Ch. 21, of the General Rules for Subordinate Courts, and such fee should be allowed.

[P 264 C 1]

Inasmuch as a man cannot be the agent of another unless he is authorized, the word "authorized" in the rule is redundant. [P 263 C 2]

Narain Prasad Asthana—for Appellant.

J. N. Banerji—for Respondent.

Judgment.—In this case the Court below refused to allow the fee of the successful respondent's pleader. It appears that the pleader in the case filed a certificate that he had duly received his fee. An affidavit was also filed by a man who purported to be a karinda of the respondent, and in this affidavit the karinda swore that he had duly paid the fee and that he had not entered into any arrangement to get back the whole or any part of the same. The learned Judge seems to have thought that having regard to R. 1, Ch. 21, of the General Rules for Subordinate Civil Courts, the Court was not entitled to allow the fee in question. The rule provides that a certificate should be filed by the legal practitioner together with an affidavit made by his client or the latter's "authorized" agent. The word "authorized" does not appear in the corresponding rule of the High Court. It seems the word is rather redundant. A man cannot be the agent of another unless he is "authorized." It is not contended that the authority to pay the fee and to make the affidavit must be in writing. We think that the affi-

davit in this case, prima facie at least, complied with the rules, and in the absence of other circumstances the certificate of the pleader, accompanied by the affidavit in question, was a sufficient compliance with the rule. We allow the appeal and direct that the decree of the Court below be amended by allowing the fee of the pleader. As this question was not raised by the opposite party but by the Court itself, we make no order as to costs. As the respondent has not paid court-fees we reject the objections.

V.B./R.K.

*Appeal allowed.***A. I. R 1919 Allahabad 264**

WALSH AND STUART, JJ.

L. Ram Chander Sarup—Applicant—Appellant.

v.

Mazhar Hussain and others—Respondents.

First Appeal No. 160 of 1918, Decided on 7th May 1919, from order of 1st Addl. Judge, Aligarh, D/- 31st July 1918.

(a) **Provincial Insolvency Act (3 of 1907), S. 24—Insolvency Court has jurisdiction to correct errors under Civil P. C. (5 of 1908), S. 152.**

An insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact, when a mistake is established.

[P 264 C 2]

(b) **Provincial Insolvency Act (3 of 1907), S. 24—Creditor exhausting all remedies for rectifying error—Insolvency Court has no jurisdiction under S. 24.**

Where a creditor in insolvency proceedings has exhausted all the remedies open to him for rectifying an error, the insolvency Court becomes functus officio and has no jurisdiction to entertain an application under S. 24, Provincial Insolvency Act.

[P 264 C 2]

(c) **Civil P. C. (5 of 1908), S. 152—S. 152 does not apply to mistakes of parties.**

Section 152 is confined to the correction of clerical errors made by the Court itself, and has no concern with the mistakes of parties.

[P 265 C 1]

Nihal Chand—for Appellant.

Panna Lal—for Respondents.

Judgment.—This is a plain case. The question arises as to whether the present appellant is now in a position under the law to establish what he claims to be the true amount of his debt, namely: some Rs. 6,000 odd. It was stated originally at about that amount by the debtor. In 1913 the creditor himself, who ought to know better than anybody else, stated the amount at Rs. 3,418 odd and sup-

ported that claim by affidavit, at which amount it was allowed. He now says that it was a mistake. No doubt the insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Civil Procedure Code to correct any mistake either of a clerk or of the parties themselves upon a question of fact when a mistake is established. It would appear that this creditor took three years or a little less to discover this serious error. But having discovered it, he applied to the insolvency Court to rectify the amount of his debt in the schedule. Whether without extending the 21 days which is given for such applications by the Act, the Court would entertain the application itself on proper grounds after being satisfied that there had been a genuine oversight, and that it had only just been discovered, does not now matter, because the Court of insolvency entertained the application and on 19th May 1916 made a formal order upon the creditor's application that the amount of the debt should be entered as Rs. 3,418 odd, the amount which appeared to the Court to be correct according to the creditor's sworn statement. That decision or order may have been right, or may have been wrong. We are not now considering the merits. It was clearly subject to appeal if it was wrong. An application was made to review it. That application for review was rejected.

All the creditor's remedies for rectifying any error, if there was an error, being thus exhausted, the order of 19th May 1916 became final and binding upon him and, according to a decision of this Court, binding also upon any other Court in which the matter might happen thereafter to be litigated. It was a final decision upon the merits and no Court has jurisdiction to reopen it. The present application was made to the same Court, although presided over by a different Judge, on 3rd December 1917, nearly two years after the decision on the merits and more than four years after the original. The application appears to have been based upon S. 24, Insolvency Act, and also on S. 152, Civil P. C. So far as S. 24, Insolvency Act, is concerned, the Court has no jurisdiction to entertain the matter at all. It had already decided it once and was functus officio. Under that section the application was properly rejected.

Section 152 seems to have been called into play upon the suggestion that the original error was a clerical error which required amendment. That however in the first place begs the question, because the Court by its order of the year 1916 had decided that it was not a mistake, but in the second place it could not in any event have been a mistake of the Court; the mistake was that of the creditor. S. 152 deals with amendments of clerical errors in orders or decrees of the Court itself which are drawn up not properly representing what the Court decides. The matter did not clearly come under S. 152, Civil P. C. There was obviously no remedy open to the creditor at all. The application was wholly misconceived. This appeal must be dismissed with costs on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 265**

RAFIQUE AND LINDSAY, JJ.

Mohammad Habibullah—Plaintiff—Appellant.

v.

Mohammad Shafi—Defendant—Respondent.

First Appeal No. 252 of 1916, Decided on 8th January 1919, from decree of Addl. Sub-Judge, Agra.

Vendor and Purchaser—Money advanced as earnest and as guarantee for contract—Breach due to default of person making advance—He cannot recover money.

A plaintiff who himself is guilty of breach of the contract in respect of which he is suing cannot claim damages arising out of his own default.

[P 267 C 1]

Where money is advanced by way of earnest and as a guarantee for the fulfilment of the contract, the persons making the advance cannot recover the money if it is found that the breach of the contract was due to his own default.

[P 267 C 1]

Iqbal Ahmad, B. E. O'Connor, S. M. Sulaiman, Motilal Nehru, Surendra Nath Sen and Lalit Mohan Banerji—for Appellant.

Kailas Nath Katju, Raza Ali and Janki Prasad—for Respondent.

Judgment.—The parties to this appeal entered into a contract on 8th of January 1914. The contract was for a supply of sleepers to the plaintiff-appellant Sheikh Habibullah. According to the terms of the contract the defendant-respondent, Mohammad Shafi, was to supply the plaintiff with 8,000 sleepers

of a particular description. It was agreed that the sleepers should be stocked for delivery at two stations on the Bengal and North Western Railway and under Cl. 4 of the contract note, it was provided that the plaintiff should have the sleepers examined and passed by the end of April 1914. After the contract note had been drawn up, Habibullah advanced the sum of Rs. 5,660 to the defendant by way of earnest money. Under Cl. 8 of the contract note, it was agreed that if, within the time fixed for the completion of the contract, the plaintiff have any cause of dissatisfaction with the defendant, the latter was to be liable to refund the earnest money and pay damages. Two suits arising out of the contract embodied in this note were filed by the parties. We are dealing here in appeal with the suit in which Habibullah was the plaintiff. According to the case set out in the plaint the defendant was guilty of breach of the contract by failing to deliver sleepers at the place appointed, within the period fixed by the agreement. It was alleged in the para. 4 of the plaint that the defendant had failed to supply even a solitary sleeper. For this reason, therefore Habibullah brought a suit to recover Rs. 9,660. Out of this Rs 5,660 represents the money which he had advanced to the defendant. The balance Rs. 4,000 was claimed by way of damages for breach of the contract.

The counter-suit, which was brought by the defendant Mohammad Shafi, was for recovery of the balance of the purchase-money. According to the case set up by him, he had fulfilled the contract into which he had entered and had supplied the goods to Habibullah as agreed upon. His case rested upon the allegation that the contract had been completed and the property in goods had passed to Habibullah. He gave credit for the amount of the earnest money received, that is to say, Rs. 5,660, and claimed Rs. 3,539 as the balance of the money which was owing to him. Both suits were tried together but separate decrees were prepared and the result of the trial was that the suit brought by Mohammad Shafi against Habibullah was dismissed. According to the learned Subordinate Judge's opinion the contract had not been fulfilled, the property in goods had not passed to Habibullah and

and therefore Mohammad Shafi was not entitled to claim the sum he was asking for as the balance of the price of the goods. An appeal against this decree was taken to the Court of the District Judge of Agra and was dismissed. So far therefore as the suit which was brought by Mohammad Shafi against Habibullah is concerned, it has been disposed of for good and all.

Turning now to the suit which was brought by Habibullah we find that on the pleadings five issues were framed, three of which related to the other suit filed by Mohammad Shafi. The result of the trial of the present suit has been that the Subordinate Judge has found that Habibullah, the plaintiff was guilty of breach of the contract. Notwithstanding his finding, he was given a decree for the refund of the earnest money less a sum of Rs. 2,265-10-0 on account of damages to which he thought Mohammad Shafi was entitled by reason of the breach. In the course of the argument it was complained by the learned counsel for the appellant that the case had not been properly tried in the Court below and certainly there are some grounds for criticizing the manner in which the case was handled by the Subordinate Judge. He tells in his judgment that both parties took up a very obstinate attitude. They were represented by pleaders whom he describes, perhaps facetiously, as "able pleaders." There seems to have been considerable wrangling between these pleaders regarding the incidence of the burden of proof and the Subordinate Judge seems to have been quite overcome by the situation and to have been unable to exercise any control over the proceedings before him. We think, under the circumstances which are shown, that the Subordinate Judge would have been well advised to express an opinion on the legal question as to which party was liable to support the burden of proof. It is evident from his judgment that he was aware of the law on the point and indeed he has expressed it quite correctly in his judgment. The plaintiff Habibullah came into Court asking for damages for breach of the contract and there can be no doubt whatever that the burden of proving a breach of the contract lay upon him.

However whatever faults may be attributed to the learned Judge in con-

nexion with these proceedings, we are not prepared to listen to the argument that a fresh trial should be ordered in the interests of the plaintiff. We have the fact that he was represented by counsel and we have also the fact that he and his pleaders stubbornly refused to produce any evidence other than certain evidence which had been previously taken upon commission. The plaintiff asserted that the burden of proof lay upon the defendant and he refused obstinately to give any other evidence. If a plaintiff takes up this attitude and if it subsequently turns out that it was a mistaken attitude he has only got to thank himself or the pleaders who were advising him. We decline to pass any orders referring this case again for a fresh trial. There is evidence on the record consisting, as we have said, of statements, which were taken on commission, of two witnesses, who were examined on behalf of the plaintiff and three on behalf of the defendant. On the materials before him, the learned Subordinate Judge came to the conclusion that the breach of the contract was due to the omission of the plaintiff to carry out his part of the agreement. The learned Subordinate Judge refers in particular to the statements of two witnesses, Chaudhri Afzal Rahman and Bashir-uddin. On their statements he holds as a matter of fact that 8,000 sleepers had been collected by the defendant at the appointed places before the end of April 1914. He further finds that the plaintiff had failed to have the sleepers inspected and passed by the Engineer whom he was employing for that purpose.

If this finding of fact can be supported it seems to us that the appellant here is not entitled to succeed in his appeal and therefore we must hold that the cross-objections which have been filed on behalf of the defendant-respondent must prevail. So far as the finding is concerned we agree with the Court below. An objection has been taken to the evidence of these witnesses, which was recorded by a Commissioner. It is said that the evidence was not recorded in the manner prescribed under the rules contained in O.18 and 26, Civil P. C. The record of the evidence is in English and it is contended that there is nothing to show that the evidence having been given in Urdu, the English record was translated to the witnesses and admitted by

them as correct. So far as this point is concerned, we have no hesitation in overruling the argument for it is clear that no objection on this score was taken to the evidence when it was tendered in the Court below, nor is the omission of a certificate to the effect that the evidence was translated to the witnesses any proof that the law has not been complied with. There is no rule that such a certificate must be attached to the record and we are entitled to resort to the ordinary presumption that everything has been done in due order. We agree with the Court below that there is no reason to discredit the statements of these two witnesses and they being accepted, it necessarily follows that Habibullah was guilty of the breach of the contract. It is hardly necessary to observe that a plaintiff who himself is guilty of breach of the contract cannot sue for damages arising out of his own default. Consequently in no circumstances is it possible for Habibullah to maintain the claim for Rs. 4,000 damages. There remains the question whether or not he was entitled to a refund of the earnest money amounting to Rs. 5,660. We have already mentioned that the Subordinate Judge has found that he was entitled to this refund less a certain sum deducted on account of damages claimable by the defendant-respondent.

The law, however is not as laid down by the Subordinate Judge. Our attention has been called to two cases in this Court, namely *Bishan Chand v. Radha Krishan Das* (1) and *Roshan Lal v. Delhi Cloth and General Mills Company Limited* (2). The third case is a case of the Madras High Court: *Vellore Taluk Board v. Gopalsami Naidu* (3). The law as settled appears to be that where a plaintiff has advanced money by way of earnest and as a guarantee for the fulfilment of the contract he cannot recover the earnest money where it is found that the breach of the contract is due to his own default. That being the law it seems to us that the proper order for the Judge to pass in this case was to dismiss the claim of Habibullah entirely. What we have said disposes of the various grounds of appeal which are to be found in the memorandum of the appellant and

also determines the cross-objections which have been filed on behalf of the respondent. We think the plea which is continued in para. 1 of the petition of cross-objections must prevail and we allow these cross-objections accordingly. The result is that the appeal fails and is dismissed with costs, including costs in this Court on the higher scale. We allow the cross-objections and award costs on the higher scale in favour of the respondent against the appellant.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 267

RICHARDS, C. J. AND BANERJI, J.

Ewaz Singh—Plaintiff—Appellant.

v.

Umrai Singh and others—Defendants—Respondents.

Letters Patent Appeal No. 132 of 1917, Decided on 19th December 1917, from judgment of Piggott, J.

Agra Tenancy Act (1901), Ss. 25, 57, and 177, Sch. C, Item 18—Sublease by exproprietary tenant for more than five years—Suit for ejectment decreed by Revenue Court—Appeal to District Judge is not competent.

Plaintiff alleged that defendants 1 to 4 were expropriatory tenants of a certain holding and that they had sublet the holding to defendant 5 for a period of more than five years in contravention of S. 25, Agra Tenancy Act, and he claimed an order of ejectment under S. 57 (d) of the Act. Defendant 5 replied that there had been no sublease of the holding in his favour, that the document under which he held though described as a *zarpeshgi* lease was in reality a mortgage, and that it gave him a valid right to possession by reason of the fact that it had been executed prior to the coming into force of the Agra Tenancy Act of 1901. He incidentally raised the plea that the plaintiff was not entitled to eject him otherwise than by a suit before a competent civil Court. The Assistant Collector decreed the plaintiff's suit. The defendants appealed to the District Judge who held that the appeal lay to him under S. 177, Agra Tenancy Act and dismissed the plaintiff's suit:

Held: that the plaintiff's suit being of the description referred to in item 18, Sch. C to the Act was one cognizable by the Revenue Courts alone, and was one in which an appeal lay from the decision of the Assistant Collector only to Revenue Courts of superior jurisdiction, and that therefore the District Judge had no jurisdiction to hear and decide the appeal. [P 268 C 1]

Mohan Lal Sandal—for Appellant.

Piggott, J.—In this case the plaintiff sued two sets of defendants in the Court of an Assistant Collector. He alleged that defendants 1, 2, 3 and 4 were expropriatory tenants of a certain holding and that they had sublet the holding to defendant 5 for a period of more than

(1) [1897] 19 All. 489.

(2) [1911] 33 All. 166=7 I. C. 794.

(3) [1915] 38 Mad. 801=26 I. C. 226.

five years, in contravention of S. 25, Tenancy Act, 2 of 1901. He accordingly claimed an order of ejectment under S. 57 (d), Act 2 of 1901. To this defendant 5 replied that there had been no sublease of the holding in his favour; that the document under which he held, though described as a *zarpeshgi* or premium lease, was in reality a mortgage; that it gave him a valid right to possession by reason of the fact that it had been executed prior to the coming into force of the Local Tenancy Act 2 of 1901. Incidentally a plea arising out of the facts above stated was taken that the plaintiff was not entitled to eject him otherwise than by a suit before a competent civil Court. The Assistant Collector overruled all the objections taken by the defendants and decreed the plaintiff's suit. The defendants appealed to the District Judge and were promptly met by the objection that no appeal lay to that Court. The learned District Judge held that an appeal lay to him by reason of S. 177, Tenancy Act 2 of 1901. He then went on to deal with the case on its merits and dismissed the plaintiff's suit. Coming here in second appeal, the plaintiff raises the point that no appeal lay to the District Judge. In my opinion this plea is well founded and must prevail. No question of jurisdiction, properly so called, had been decided by the Assistant Collector.

The plaintiff came into Court upon certain allegations which, if established, gave him a clear right of suit in virtue of Ss. 25, 31 and 57, Tenancy Act, and that suit being of the description referred to in item 18, Sch. C to the same Act, was one cognizable by the Revenue Court and by the Revenue Court alone, and moreover, it was one in which an appeal lay from the decision of the Assistant Collector only to Revenue Courts of superior jurisdiction. The plaintiff's claim was met by allegations of fact which, if established, would disentitle the plaintiff to any relief. When it was stated in para. 4 of the additional pleas in the written statement filed by defendant 5 that he was not a subtenant but a mortgagee, and that consequently the suit was not cognizable by a Revenue Court, the plain meaning of the plea taken is that if the defendant can establish the facts to be as alleged by him and not as alleged in the plaint, then the plaintiff will not be en-

titled to the remedy claimed by him in the Revenue Court. There was nowhere any plea that the suit as brought was not cognizable by the Revenue Court, that is to say, that assuming the allegations made in the plaint to be true, the Assistant Collector had no jurisdiction to entertain that plaint. In any case the question is covered by recent authority. I refer to the unreported decision of a Bench of this Court in *Deo Narain Singh v. Sitla Baksh Singh* (1) decided on 25th May 1916. The present case is, in my opinion, a stronger one in favour of the plaintiff-appellant. In any event I, sitting as a single Judge am bound to follow the decision above referred to. The result is that I so far accept the appeal that I set aside the decree of the learned District Judge and remand the case to his Court, with directions to return the memorandum of appeal to the defendants-appellants for presentation to the proper Revenue Court having jurisdiction to entertain it. Costs here and hitherto will be costs in the cause.

Judgment.—We agree with the view taken by the learned Judge of this Court and dismiss the appeal.

V.B./R.K. *Appeal dismissed.*

(1) [1918] 40 All. 177=47 I. C. 891.

A. I. R. 1919 Allahabad 268

BANERJI AND PIGGOTT, JJ.

Ram Khelawan and another—Plaintiffs—Appellants.

v.

Ram Nares Singh and others—Defendants—Respondents.

First Appeal No. 217 of 1916 decided on 23rd April 1919 from the decree of Sub-J. Gorakhpur, dated 4th April 1916.

Hindu Law—Alienation—Necessity—High rate of interest—Mortgagee must prove necessity for onerous rate—Rate held to be excessive.

It is incumbent upon a mortgagee suing to enforce his mortgage to prove not only the existence of family necessity, but that there was necessity for borrowing at an onerous rate of interest.

Where, a mortgage deed provided for the payment of interest at 24 per cent. per annum and compound interest with half yearly rests, and the mortgagee failed to prove that there was any necessity for borrowing at such high rate of interest and the Court reduced the rate of interest to 18 per cent. simple interest, and finding at this rate the mortgagee had been repaid an amount sufficient to cover the principal and interest, it dismissed the suit:

Held, that the suit was rightly dismissed.

[P 269 C 1, 2]

T. B. Sapru and Iswar Saran—for Appellants.

U. S. Bajpai and P. L. Banerji—for Respondents.

Judgment.—This appeal arises out of a suit for enforcement of a mortgage, dated 27th August 1900. The plaintiffs are the legal representatives of the mortgagees and some of the defendants are mortgagors and the rest are the legal representatives of the other mortgagors. The principal amount secured was Rs. 900. Interest was payable at the rate of 24 per cent. per annum and compound interest with half yearly rests. The amount claimed is Rs. 6,745-4-0, after giving credit for Rs. 2,600 admitted to have been received. Some of the defendants denied the mortgage and also asserted that there was no family necessity for incurring the loan. The Court below has found that the loan was incurred for payment of past debts secured on family property, but it was of opinion that the plaintiffs had failed to prove that there was any necessity for borrowing money at the high rate of interest provided for in the mortgage. It accordingly reduced the rate of interest to simple interest at 18 per cent. per annum and, finding that the amount paid back to the plaintiffs was sufficient to cover the principal and interest at the rate above mentioned, dismissed the suit. The plaintiffs have preferred this appeal. The only contention raised on their behalf relates to the question of necessity for borrowing the money at the high rate of interest mentioned in the mortgage deed. It has been held by their Lordships of the Privy Council, and their decision has been followed in this Court, that a mortgagee must not only prove the existence of family necessity but he must also prove that there was necessity for borrowing at an onerous rate of interest. The latest pronouncement of their Lordships of the Privy Council is contained in their judgment in *Nawab Nazir Begam v. Rao Raghunath* (1) in the following terms :

"It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate and upon such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand."

(1) A. I. R. 1919 P. C. 12=41 All. 571=50 I. C. 434=46 I. A. 145 (P. C.).

This judgment was delivered on 18th February last and does not appear to have been reported. Their Lordships adhered to the view expressed by them in *Hurro Nath Rai Chowdhri v. Randhir Singh* (2) and approved of the decision of this Court in *Nand Ram v. Bhupal Singh* (3). It is true that no evidence was given on the point by either party in this case, but as their Lordships observed in the case to which we have referred, "the thing spoke for itself." There can be no doubt that the rate of interest agreed upon by the manager of the family was inordinately high. The property was amply sufficient to secure repayment of Rs. 900 with reasonable interest and the fact that the plaintiffs seek to recover more than Rs. 6,000 by sale of the mortgaged property, is sufficient to show that the security was ample. Under these circumstances we think the learned Subordinate Judge was right in reducing the rate of interest to simple interest at Rs. 18 per cent. per annum. Allowing interest at that rate, the plaintiffs have not only recovered from the defendants the principal amount but also interest at that rate. The suit was, therefore, rightly dismissed and we dismiss this appeal with costs, including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(2) [1891] 18 Cal. 311=18 I. A. 1 (P. C.).

(3) [1912] 34 All. 126=13 I. C. 5.

A. I. R. 1919 Allahabad 269

RICHARDS, C. J., AND BANERJI, J.
Sheomangal and others—Applicants.

v.

Dil Raj and others—Opposite Parties.
Civil Revn. No. 134 of 1918, Decided on 10th March 1919.

Civil P. C. (1908), O. 7, R. 11—Partition suit referred to arbitration—Decree drawn up in accordance with award—Failure of plaintiff to comply with order to deposit stamp duty—Suit cannot be dismissed merely by reason of nondeposit.

Where in a suit in which an order has been made for the preparation of a decree in terms of an arbitration award, the plaintiff fails to comply with an order of the Court to pay stamp duty, as distinguished from court-fees, his commission to pay is no justification for dismissing the suit [P 270 C 1]

In a suit for partition the matter was referred to an arbitrator who made an award and a decree was prepared in terms of the award. The plaintiff was ordered to pay stamp duty payable upon an instrument of partition. The order was not complied with and the Court thereupon dismissed the suit :

Held: that the Court had no jurisdiction to dismiss the suit after a decree had been ordered to be drawn up merely by reason of the nondeposit of the stamp duty. [P 270 C 1]

Saila Nath Mukerji—for applicants.

Iswar Saran—for Opposite Parties.

Judgment.—This application in revision arises under the following circumstances. The plaintiff, who is the applicant here, brought a suit for partition. The parties referred the matter to arbitration and an award was made. No objection having been taken to the award, the Court directed that a decree should be made in the terms of the award. A week after this, the Court directed the plaintiff or his pleader to deposit Rs. 10. It may be pointed out here that this Rs. 10 was not a court-fee. It was the stamp duty which was payable upon an "instrument of partition" which includes a decree for partition. For some reason or other, not very clear, this order was not complied with. In the meanwhile another Judge had taken the place of the Judge who had made the order directing a decree to be drawn up in accordance with the award. This new Judge, finding that the order had not been complied with, dismissed the plaintiff's suit. The applicant contends that there was no jurisdiction in the Court to dismiss the suit after a decree had been ordered to be drawn up merely by reason of the nondeposit of the stamp duty. We think that this contention has force. Possibly if there had been a nonpayment of necessary court-fees, the Court would have had jurisdiction to dismiss the suit, but as already pointed out this was a stamp duty, not a court-fee. It would be certainly unfortunate if the order of the Court below remains. The parties would be left with a legacy of useless litigation. We allow the application and set aside the order of the Court below dismissing the plaintiff's suit, but on this condition that the applicant here shall deposit the stamp duty of Rs. 10 in the Court below within two months from this date. If he fails to do so, this application in revision will stand dismissed with costs without any further order. If the Rs. 10 is duly deposited, then we direct the parties to pay their own costs of this application. The record may be returned to the Court below as soon as possible.

V.B./R.K.

Application allowed.

A. I. R. 1919 Allahabad 270

RICHARDS, C. J. AND BANERJI, J.

Mt. Bindo Bibi—Plaintiff—Appellant.

v.

Ram Chandra and others—Defendants—Respondents.

First Appeal No. 197 of 1916, Decided on 10th April 1919, against the decision of Sub-Judge, Allahabad, D/- 27th March 1916.

Civil P. C. (1908), O. 2, R. 2—O. 2, R. 2 does not apply to case of two separate properties held under separate titles—Keeping plaintiff out of possession of these gives rise to distinct causes of action.

The provisions of O. 2, R. 2, Civil P. C., apply to bar those suits only in which the cause of action and the defendants are the same as in the previous suit. The rule would not apply to the case of two separate properties held under separate titles, as the keeping of the plaintiff out of possession of these would give rise to distinct causes of action within the meaning of the rule [P 271 C 1]

Moti Lal Nehru, J. L. Nehru and Sital Prasad Ghose—for Appellant.

S. C. Chaudhry, Tej Bahadur Sapru, A. P. Dube, Damodar Das and Radha Kant Malaviya—for Respondents.

Richards, C. J.—This appeal arises out of a suit in which the plaintiff claimed a considerable amount of property of different descriptions. There were a considerable number of houses, a number of cultivatory holdings situated in different Mauzas and Mahals. There were also a number of defendants who were in occupation of different parts of the property claimed. The principal defendant was Ram Chandra. When I say the principal defendant, I mean that he appears to have been in possession of a greater number of the houses and some of the holdings. The plaintiff's title was that the property belonged to her father one Beni Prasad, that he died leaving a widow Mt. Kousilla, the mother of the plaintiff, that the mother died and that the plaintiff thereupon became entitled to the property. The defences vary considerably by the different defendants. Some of the defendants allege that the property did not belong to Beni Prasad at all and that the property belonged to other persons. Some of the defendants did not even claim through Ram Chandra. Ram Chandra pleaded that he was the adopted son of Beni Prasad. He did not at all admit that all the property belonged to Beni Prasad; on the contrary, he alleged (see paras. 17 and 18 of the written statement) that some of the property

never belonged to Beni Prasad. The Court below dismissed the plaintiff's suit on the ground that the bringing of the present suit violated the provisions of O. 2, R. 2, Civil P. C. O. 2, R. 2, is as follows:

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

Clause 2 provides that:

"Where a plaintiff omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished."

It appears that prior to the institution of the present suit the plaintiff instituted another suit against Ram Chandra and a man called Kidar Nath, in which she claimed possession of a grove and a house. The Court below has held that in this previous suit Mt. Bindo Bibi ought to have claimed all the property she claims in the present suit and not having done so, the present suit is barred by the provisions of the Code of Civil Procedure to which I have just referred. The plaintiff has appealed. In the absence of authority I should have been reluctant to hold that the plaintiff is bound by the provisions of O. 2, R. 2, to include in the same suit two separate properties held under separate titles. It seems to me that the keeping of the plaintiff out of possession of two separate properties held under different titles are distinct "causes of action" within the meaning of that expression in O. 2, R. 2. There is however a Full Bench decision of this Court, *Murti v. Bhola Nath* (1), which goes this length. In that case a creditor had attached mortgagee rights in one property and proprietary rights in another in execution of a simple money decree. The claimant to the property objected and the objection was allowed. Thereupon the judgment-creditor instituted two suits, one in respect of the mortgagee rights and the other in respect of proprietary rights. The Full Bench held that the second suit was barred by the corresponding rule of the Code of Civil Procedure of 1882.

It must be borne in mind however that both the suits in that case were against the same party. It is strongly urged on behalf of the respondents that the present case cannot be distinguished from the Full Bench ruling to which I have just referred. It seems to me that there is a

clear distinction. Not only were the two suits brought by the present plaintiff in respect of entirely different properties but the only defendant who is common to the two suits was the defendant Ram Chandra. Kidar Nath, Ram Chandra's co-defendant in the previous suit, is not a defendant to the present suit and he appears to have no connexion of any kind with the property which it is now sought to recover. In the same way none of the defendants to the present suit had anything to say to the property, the subject-matter of the previous suit, except Ram Chandra. Even the allegation made in the previous suit as to how the defendants had taken possession of the property was different from the allegations in the present suit. In the previous suit it was alleged that Ram Chandra had had his name recorded in respect of a grove in order that he might assist the plaintiff's mother and that the other defendant had been allowed to live in the house by the leave and license of the plaintiff's mother. In my opinion the "cause of action" in the present suit is not the same as the cause of action in the previous suit brought by the same plaintiff within the meaning of O. 2, R. 2. Furthermore, I may point out that it has been expressly held by this High Court in a Full Bench ruling that for a suit to be barred by a previous suit not only must the "cause of action" be the same but the defendants must also be the same. I would allow the appeal and remand the case for disposal on its merits.

Banerji, J.—I am also of opinion that the suit is not barred by the provisions of O. 2, R. 2, Civil P. C. As was said by me in my judgment in the case of *Balmakund v. Sangari* (2), O. 2, R. 2 which corresponds to S. 43, Act 14 of 1882, was enacted with the object of preventing a splitting up of the same cause of action and to prevent the same persons being twice vexed for the same cause. To make the section applicable two things are essential, namely, first, that the previous suit and the present suit must arise out of the same cause of action and secondly, that they must be between the same parties or between parties under whom they or any of them claim. As I said in that judgment;

"A plaintiff's cause of action is not only the right which he asserts but the infringement of that

(1) [1894] 16 All. 165 (F.B.).

(2) [1897] 19 All. 379 (F. B.).

right by the defendant. Where the plaintiff's right is infringed by more persons than one and by different acts done separately by each of them the plaintiff has a separate cause of action against each of these persons."

In the present case the cause of action alleged is not the act of the same defendant which was alleged in the previous suit to be an infringement of the plaintiff's alleged title but the acts of various defendants who set up various rights in respect of different portions of the numerous properties which were claimed in the present suit. It cannot therefore be said that the present suit is based on the same cause of action as that which existed in the first suit. Furthermore, as pointed out by the learned Chief Justice, the defendants to the two actions are not identical and all the defendants to the present suit do not claim title from Ram Chandra. The view which I took in the case to which I have already referred was affirmed in the later case of *Gobind Krishna Narain v. Sirajunnissa* (3) and I see no reason to alter it. I therefore agree in remanding the case to the Court below for trial upon the merits.

By the Court.—The appeal is allowed, the decree of the Court below is set aside and the case remanded under O. 41, R. 23 with directions to readmit the same on its original number and to proceed to hear and determine the same according to law. Costs here and heretofore shall be costs in the cause, including in this court-fees on the higher scale.

V.B./R.K. *Appeal allowed.*

(3) [1910] 6 I. C. 226.

A. I. R. 1919 Allahabad 272

WALSH AND STUART, JJ.

Jhumak Rai and another—Defendants—Appellants.

v.

Bindeshri Rai and others—Plaintiffs—Respondents.

First Appeal No. 7 of 1919, Decided on 7th May 1919, from order of Sub-Judge, Ghazipur, D/ 23rd November 1918.

U. P. Land Revenue Act (3 of 1901), S. 233-K—Fraud committed by one party during partition proceedings in Revenue Court—Suit lies in civil Court—Jurisdiction.

An action will lie in the civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the defendant, even although the fraud was one practised upon a Revenue Court and would affect the result of partition proceedings which are the business of the Revenue Court.

[P 272 C 2]

The question of the remedies open to a plaintiff where he has been deprived of his rights owing to the fraud of the defendant discussed and the remedy indicated. [P 273 C 1]

U. S. Bajpai—for Appellants.

P. L. Banerji—for Respondents.

Walsh, J.—This is an appeal from an order of remand. The plaintiffs' case is that they have been deprived of their rights by the fraud of the defendants. The question arises out of partition proceedings in the Revenue Court. The allegation is not that the partition proceedings were wrongly decided but that by an improper entry in the papers made through the dishonest intervention of the defendants by a clerk or some official in the administrative department, the effect of the partition has been injuriously to affect the rights of the plaintiffs. The fraud as stated is a remarkably simple and yet an ingenious one. The question was as to the destination of certain trees. If the trees were to go with the land allotted to any particular party, no entry was made in the column provided for remarks, but if the trees were reserved or allotted to some party other than the party who took the land, then an entry was made appropriating the trees to him. The plaintiffs' case is that that entry was made not by the act of the Revenue Court but by the act of the defendants assisted by a dishonest official. Of course, if that were made out nobody would contend that it ought not to be rectified and it is to be hoped that there is some remedy somewhere to correct faults of that kind. There is clear authority in this Court, namely, the cases reported as *Mahadeo Prasad v. Takia Bibi* (1) and *Raghunandan Ahir v. Sheo Nandan Ahir* (2), that an action will lie in the civil Court to provide a remedy where a person's rights have been infringed by some fraudulent act of the defendant, even although the fraud was one practised upon the Revenue Court, and would affect the result of partition proceedings which are the business of the Revenue Court.

On the other hand, there is a Full Bench authority of this Court in *Muhammad Sadiq v. Laute Ram* (3) to the effect that civil Courts have no jurisdiction to entertain a claim to reopen a partition made in the Revenue Courts.

(1) [1903] 25 All. 19.

(2) [1919] 49 I. C. 306.

(3) [1901] 23 All. 291 (F.B.).

What is the appropriate remedy of a person making such complaint? We think he is not necessarily confined to one remedy. It appears that he might succeed in an application by way of review or some similar application to the Revenue Court itself, although, so far as we can see, it has never been decided by the Revenue Court that it will entertain an application for review, to review its own orders on such matters, and it is no doubt true that the Revenue Courts are neither accustomed to nor are they the most appropriate places for an investigation of a serious matter of that kind. In this particular case the plaintiffs did in fact apply to the Revenue Court and the Revenue Court declined to interfere and with considerable circumspection referred them to another Court, taking care not to inform them what Court it had in its mind. Thereupon the plaintiffs went to another Court, perhaps not unnaturally under the circumstances a criminal one on this occasion, and were there met by the objection that they had not obtained a sanction. It hardly lies in the mouth of the defendants under these circumstances, when the plaintiffs have arrived at last by a process of elimination at the last Court to which they can possibly go, to contend that that Court has no right to entertain the complaint. We think there is nothing to oust the jurisdiction of the civil Court in this case and that really we are bound by the authorities, it being clearly understood that the charge of fraud made in the plaint must be proved against the defendants.

The Court which decided this question in 25 Allahabad [*Mahadeo Prasad v. Takia Bibi* (1)] took the somewhat narrow view of refusing to say what the nature of the redress would be. They seemed to think that it would be premature to express any opinion upon that question. We do not share that view. The matter is before us as a matter of principle and there seems no reason why we should not have the courage of our opinions and indicate what the real remedy which the plaintiffs seek is and to which they are entitled, if they establish the facts in their favour. The plaint as drafted no doubt fell somewhat short of what was required when it came to the prayer for relief. We do not think that in a matter which in itself is clearly

within the jurisdiction of the Revenue Court, unless the plaintiffs' claim is established, that a mere claim for possession is the appropriate relief, and the first Court itself took that view pointing out that what they wanted was a declaration that certain papers of the Revenue Department had been tampered with and wrong entries surreptitiously made therein. We think the plaintiffs would be well advised to apply to the trial Court to amend the prayer for the relief from the somewhat general terms contained in Cl. B to a definite claim for a declaration that they are entitled (assuming always of course that they establish their case in fact) to have the improper entry in the revenue papers removed, and to be restored to the position in which they were before the entry was made. And further if they be so entitled on the facts to a declaration that they are entitled to possession of the trees which they claim. Assuming that they succeed, armed with these declarations passed in their favour by a competent Court deciding the matter upon the merits, this could go to the Revenue Officer and, we have no doubt that the Revenue Court over whom of course this Court has no jurisdiction whatever to alter any entry contained in its records, will respect the decree of the civil Court and act accordingly. The appeal must be dismissed with costs on the higher scale.

Stuart, J.—I concur in the order proposed.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 273

KNOX, J.

Sanahi Ram—Appellant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 822 of 1918, Decided on 9th January 1918 by Sess. Judge, Cawnpore.

Factories Act (1911), S. 41 (a)—Proof of employment contrary to provisions of Act is necessary.

The Factories Act is a special Act and before a conviction can be had under S. 41 (a) of the Act there must be definite evidence to show that the boy was either employed or was allowed to work contrary to the provisions of the Act.

[P 274 C 2]

C. Dillon—for Applicant.

The facts appear from the following **Referring Order**—In this case Sanhei Ram, Manager of the Jute Mills, Cawnpore, applies in revision in respect

of his conviction under S. 41 (a), Factories Act, 12 of 1911. The prosecution case was as follows: When Mr. Parker, Inspector of Factories, inspected the mill he found that there were fifty-seven boys at work, whereas the register only showed that there were fifty-six boys out of a total of sixty in the register who were entered as present on that day. One boy of seven or eight was said to have run away immediately upon the Inspector coming to the juvenile portion of the Factory. This boy's name was according to the prosecution Ram Dial. The case was tried summarily. When the register was produced before the lower Court it showed Ram Dial No. 189 as being both in the register and in attendance on the day in question. The Magistrate believed that his name was entered subsequent to the visit of the Inspector, and after examining the register I am of the opinion that this was a justifiable conclusion in view of the fact that the Inspector stated positively that the name was not in the register when he inspected. In appeal two pleas have been taken up. The first plea is that even on the finding of fact of the lower Court there can have been no offence under S. 41 (a). This plea must be held good. S. 41 (a) runs:

"If in any factory any person is employed or allowed to work contrary to any of the provisions of the Act."

There is no proof that the employment of this boy, Ram Dial, was contrary to any provisions of Chap. V of the Act or of any other portion of the Act, nor does it appear to have been contended that it was so. The offence of employing the boy without having his name entered in the register would appear to fall under Cl. (h), S. 41. This runs:

"If in any factory the register prescribed by S. 35, is not kept up-to-date"

It is obvious that if Ram Dial was employed and his name was not in the register, the register could not be kept up-to-date. The pleader for the applicant, however, maintained that the facts really would not justify a conviction under S. 41 (h). His explanation of what happened is as follows: He says that a boy Ram Prasad (who had attained the age of fourteen and had been transferred to work in the adult department) on the day when the Inspector came to the factory by force of habit or some other reason came into the place where the juveniles worked. There is no founda-

tion whatever in my opinion for this story, and it is incompatible with the Inspector's statement that the boy was one of seven or eight years and was actually working. At the same time it appears to me that a conviction for merely not keeping a register up-to-date is much less serious to a factory manager than one for allowing a person to work contrary to the provisions of the Act. It would also reasonably entail a smaller penalty. I am therefore of the opinion that the case should be reported to the High Court for the passing of such orders as it thinks fit, after the explanation of the Magistrate concerned has been obtained.

Judgment.—I agree with the view taken by the learned Sessions Judge who has referred this case that no offence under S. 41 (a), Act 12 of 1911, has been proved. There is nothing on the record to show that the boy, whoever he was, who ran away, was employed or allowed to work contrary to any of the provisions of the Act. The Act being a special Act, there must be definite evidence to show that the boy was either employed or being allowed to work. The boy may have been there for any purpose. We all know the nature of boys. He may have stolen in for some purpose quite apart from employment or being allowed to work. I set aside the conviction and sentence and direct that the fine or any part of it which has been paid, be refunded.

V.B./R.K.

Conviction set aside.

A. I. R. 1919 Allahabad 274

RAFIQUE AND WALSH, JJ.

Bhairo Prasad and another—Petitioners—Appellants.

v.

S. P. C. Dass—Respondent.

First Appeal No. 198 of 1918, Decided on 1st May 1919, from order of Dist. Judge. Benares, D/- 15th November 1918.

Provincial Insolvency Act (1907), S. 22—Trespass in proceedings in insolvency by Official Receiver or anybody on property of stranger—Stranger may seek redress in ordinary civil Court or apply under S. 22—Decision on application under S. 22 is final.

Where in proceedings in insolvency a trespass is committed, whether by the Official Receiver or by anybody else, upon the property of a stranger to the proceedings, he has the ordinary right to seek redress in the ordinary civil Court, and is not bound to apply to the insolvency Court.

If however he does so apply under S. 22 he must comply with the terms of that section, and if he obtains a decision upon the merits the decision is final. [P 275 C 1]

*U. S. Bajpai and Haribans Sahai—*for Appellants.

*P. L. Banerji and Bhagwati Shankar—*for Respondent.

Judgment.—This appeal must be dismissed. It was clearly an application S. 22, Provincial Insolvency Act. A stranger to the insolvency is not bound to go to the Insolvency Court at all. He has the ordinary right, which every individual has, to seek redress in the ordinary civil Courts for any grievance or trespass to his property, whether committed by an Official Receiver or anybody else, but he can, if he pleases, if he complains against the act of the receiver, apply under S. 22 to the insolvency Court itself and a Bench of this Court has held that if he does so and obtains a decision upon the merits, that decision is final. But similarly if he applies under S. 22, he must comply with the terms of S. 22. In this case he applied after the expiration of 21 days of the act of attachment of which he complains. We are inclined to think, though we do not decide, that S. 4, Lim. Act, would have enabled him to apply as soon as the Court opened, it being sent at the time of the attachment, but even after the Court opened he delayed for a further ten days. The learned Judge was therefore right in dismissing the application, not upon the merits but as an application which, under the Provincial Insolvency Act, he had no jurisdiction to entertain.

The applicant very foolishly in our view, added an alternative payer to the District Judge asking him, in the event of his application being dismissed, to grant him permission to sue in a civil Court. As a matter of law such permission could be neither given nor refused. It was in fact refused. We think in order to remove any possible misunderstanding that that refusal being nugatory must be struck out of the order, but holding as we do that the application was properly dismissed as one which had been made beyond time, this appeal, except to the extent already indicated by what we have said, is dismissed with costs, including in this Court fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 275

KNOX, AG. C. J. AND BANERJI, J.

*Jauhari Singh—*Plaintiff—Appellant.
v.

*Ganga Sahai and another—*Defendants—Respondents.

Letters Patent Appeal No. 88 of 1917, Decided on 14th May 1919, against the order of Rafique, J., in Second Appeal No. 1581 of 1915, D/- 25th April 1917.

(a) **Mortgage—Two mortgagees, each having half-share in two mortgages—One taking usufructuary mortgage of whole property and giving discharge for both mortgages—Discharge operates only in respect of share of usufructuary mortgagee.**

One of two mortgagees, each having a half-share in two mortgages, took a usufructuary mortgage of the whole property mortgaged from the mortgagors, the consideration being the amount of the two simple mortgages, and gave a discharge for both mortgages:

Held, that the discharge operated only in respect of the share of the usufructuary mortgagee, and that the other mortgagee was entitled to recover his share. [P 276 C 1]

(b) **Transfer of Property Act (1882), S. 67—Severance of interest—S. 67 does not apply.**

Where there has been a severance of the interests of the mortgagees, S. 67 has no application. [P 276 C 1]

*P. L. Banerji—*for Appellant.

*B. K. Mukerji and S. C. Choudury—*for Respondents

Judgment.—This and the connected appeal, No. 89 of 1917, arise out of two suits brought by the plaintiff-appellant on the basis of two mortgages. One of these mortgages was executed on the 3rd February 1902 by Kashi Ram in favour of the plaintiff Jauhari Singh and his brother Balwanth Singh. The other mortgage was dated 12th April 1902 and was executed by Ganga Sahai the brother of Kashi Ram, in favour of the same mortgagees. On 30th June 1913 Balwant Singh alone took a usufructuary mortgage from the two mortgagors in respect of the whole of the property mortgaged by them and the consideration for the usufructuary mortgage was the amount of the two simple mortgages of 1902 mentioned above. Jauhari Singh alleged that he had half-share in the two mortgages and he brought these suits to recover his half-share of the mortgage money. He made parties to the suit the mortgagors and his own brother Balwant Singh. Balwant Singh's defence was that the amount of the two mortgages had been advanced by him alone and that Jauhari Singh had no interest in the mortgages. The Court of first instance accepted this

contention and on that ground amongst others dismissed the suit.¹ The lower appellate Court on the other hand found that the mortgages were made in favour of Jauhari Singh and Balwant Singh and that both of them owned the two mortgages and the share of Jauhari Singh was one-half in each of the two mortgages. But the learned Judge upheld the decree of the Court of first instance, on the ground that one of the two mortgagees could not bring a suit for his share of the mortgage money. This decree of the lower appellate Court has been affirmed by a learned Judge of this Court.

We are unable to agree with the learned Judge of this Court. When Balwant Singh took a usufructuary mortgage of the property of the mortgagors from both mortgagors in lieu of the amounts of the two mortgages, he gave them a discharge for the two mortgages. As Jauhari Singh has been found to have owned a half-share in the two mortgages, that discharge could only operate in respect of the half share of Balwant Singh himself. The two mortgages were therefore in law discharged to the extent of one-half and as they were discharged to that extent only, the portion of the mortgages which remained undischarged was the half-share which belonged to Jauhari Singh. This Jauhari Singh is entitled to recover. S. 67 no doubt provides that one of several mortgagees cannot seek to enforce the mortgage unless there has been a severance of the interests of the mortgagees. This provision in the section was clearly enacted for the benefit of the mortgagor. Balwant Singh can no longer put forward any claim against the mortgagors, and so far as his interests are concerned, there has been a severance of interest of the mortgagees and this has been effected by the consent of the mortgagors. It is true that the mortgagors in this case consented to obtain a full discharge from Balwant Singh; but the legal effect of that discharge was that it operated in respect of Balwant Singh's own share only. So that in law the act of the mortgagors and Balwant Singh amounted to a severance with the consent of the mortgagors of the interest of the mortgagees. The case of *Gobind Ram v. Sundar Singh* (1) has been relied on by the respondents and by the learned Judge of this Court. The facts of that case are not similar to those of the

(1) (1892) A. W. N. 246.

present. We have referred to the paper book in that case, and find that what was alleged there was that one of the mortgagees in collusion with the mortgagors had given back the mortgage-deed to the mortgagor. It was not asserted that a discharge had been given to the mortgagors by one of the mortgagees. We think that that case is no authority as against the appellant in the circumstances of the case before us. The result is that we allow the appeal, set aside the decrees of this Court and of the Courts below and decree the plaintiff's claim with costs in all Courts. The mortgagors will have six months from this date to pay off the amount of the decree. Interest will be paid at the contractual rate up to the date fixed for payment and thereafter at 6 per cent per annum.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 276

KNOX, J.

Parwari—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 743 of 1918, Decided on 3rd January 1919, from an order of Sessions Judge, Saharanpur.

(a) Criminal P. C. (1898), Ss. 154 and 155—Defamation—Statement to police under Ss. 154 and 155 are privileged—Penal Code (1860), Ss. 499 and 500.

Statements made to a police officer under Ss. 154 and 155, Criminal P. C., are privileged and cannot be made the foundation of a charge of defamation. [P 277 C 2]

(b) Penal Code (1860), Ss. 499 and 500—Criminal defamation—Provisions of the Code must be carefully followed.

In dealing with cases of criminal defamation it is necessary to follow carefully the provisions made in the Penal Code on the question of defamation. [P 278 C 1]

(c) Penal Code (1860), Ss. 499 and 500—Difference between criminal liability for defamation under English law and Indian law indicated.

There is a marked difference between criminal liability for defamation under the English law and under the Indian law, arising from the fact that the English criminal law when dealing with defamation had mainly to consider whether the defamation was such as would result in breach of the peace or the question whether the person who claimed punishment for defamation was a person aggrieved by the statements made.

Under the Indian law the essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. [P 278 C 1]

A. S. Osborne—for Applicant.

Nihal Chand and *J. M. Banerji*—for the Crown.

Judgment.—This is a case in revision. The Sessions Judge of Saharanpur had before him an appeal by a woman, one Mt. Parwari, so called at any rate. The appellant had been convicted of the offence of defamation and sentenced under Ss. 499 and 500, I.P.C., to two months' rigorous imprisonment. The complaint had been instituted against her by one Chhajju Singh. Chhajju Singh, according to the prosecution, was stepbrother of one Mt. Parwari, Rajput by caste, and Mt. Parwari was the wife of Pirthi Singh, also Rajput. Parwari, some two years before the complaint was lodged, had gone to the house of Umrao Singh, her sister's husband. There she fell ill and died on 21st June 1916. After her death, Pirthi Singh gave it out that she was still alive and that Umrao Singh's story that she was dead was false, and the woman was really in concealment in Umrao Singh's house. Parwari and her husband and relations had wanted, so the complainant says, to outcaste him and his family and in order to effect this had put up the appellant, who was in fact a Chamar woman, to pretend to be his wife; that, in pursuance of this conspiracy, the appellant had been induced to go to the Courts at Dehra and to make a false statement that the effect that she was Pirthi Singh's wife and had been kept in seclusion as above mentioned. As a result of this, the complainant, his parents and Umrao Singh, have been outcasted. The complaint went on to say that the feelings of the complainant had been further outraged by statements made by the appellant. Those statements were certainly statements, if true, to the prejudice of the complainant and his relations. All these statements were said to have been made by the woman appellant to a Sub-Inspector of Police stationed at Rikhi-kesh and when the charge-sheet was drawn up, the woman was charged with having, on 26th February 1918, at Rikhi-kesh by words spoken to the Sub-Inspector, published an imputation of incestuous connexion with different persons, knowing that such imputation would harm the reputation of Mt. Parwari, if living, and intended to harm the feelings of the near relatives such as her father and brother. The statements are then

set out in the charge sheet and it is added that she had thereby committed an offence punishable under S. 499 read with S. 500, I. P. C. The record, as it stood, was, as I pointed out in my order of 2nd December 1918, so meagre that it was difficult to decide from it the precise circumstances under which the statement of 26th February said to have been made by the appellant came into existence. In order to ascertain these circumstances I summoned Sub-Inspector Inderjit Singh, the Sub-Inspector concerned, to ascertain these circumstances as far as possible. His evidence has been recorded and I cannot say that it is at all satisfactory. Taking it, as it stands, he says that the statement contained in Ex. H was a statement made under the authority of S. 154, Criminal P. C., 1898. As to the statements contained in Exs. I and J, he found it difficult to say positively how those statements came to be made. Eventually however he deposed that they were statements made in consequence of action taken by him under S. 155, Criminal P. C. He is not a novice in police work, for he says he has been Sub-Inspector for five years, but left it rather doubtful whether he did intentionally and knowingly act under the authority of S. 155 of the Code or of some authority given him by the Police Manual. If the statements resulted from action taken under S. 154, or under S. 155, they are privileged statements, and as such, should not have been used as evidence at all [see S. 162, Criminal P. C., and the case of *Manjaya v. Sessa Shetti* (1) and also *Queen-Empress v. Govinda Pillai* (2)]. The Madras High Court is very positive and consistent upon the view that statements under these circumstances are privileged and cannot be made the foundation of a charge of defamation.

I do not know what authority the Police Manual may give, but whatever authority it may give, if it does give any authority, that cannot override the law. It is difficult to understand how the Sub-Inspector could have taken these statements at all. The probability is that he took them out of prurient curiosity and not in the course of any investigation made under Ch. 14, Criminal P. C. I mention this as what I am about to say

(1) [1883] 11 Mad. 477.

(2) [1893] 16 Mad. 235.

might otherwise be considered obiter dictum.

I have on previous occasions pointed out that in dealing with cases of criminal defamation it is necessary to follow carefully the provisions made in the Indian Penal Code on the question of defamation. There is a marked difference between criminal liability for defamation under the English law and under the Indian law, arising no doubt from the fact that the English criminal law, when dealing with defamation, had mainly to consider whether the defamation was such as would result in a breach of the peace or the question whether the person who claimed punishment for defamation was a person aggrieved by the statements made. In the present case the defamation consisted of imputing matters which concerned a deceased person. The authors of the Code have themselves pointed out their intention that the Penal law in India on this point should differ from that in England. Their intention was that the essence of the offence of defamation should consist in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. This was the reason evidently why they attached to S. 499 the explanation marked I. S. 499 by itself could not touch the present case. The imputation affected a deceased person. Expl. I expands S. 499 by adding that it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives. The learned counsel who supported the case for the prosecution argued that in this case intention was proved, if it was the probable consequence of the act done. I find myself unable to agree with him, ably as he put forward that argument, and I hold that in the present case it was incumbent upon the prosecution to prove not only that the statements made by the appellant would have harmed the reputation of Mt. Parwari as they undoubtedly would have, but also that he had to prove that statements were made with an intention to be hurtful to the feelings of

Chhajju Singh, Chhajju Singh's family or other near relatives. Whether the words "near relatives" would include Chhajju Singh is open to question.

The evidence for the Crown is however that the appellant on 26th February made statements on which she has been convicted under these circumstances: A constable came upon her in a fair; she was at the time wearing a male attire. For some reason or other he suspected that she was not a male person, but a woman in male attire. He took her to the Thana of Rikhikesh. She was seen at once by the Sub-Inspector, Inderjit Singh. He questioned her and came to the conclusion that she was a woman masquerading in male clothes. The statements she made at that time were not statements to the prejudice, but if it can be so said, would have been to the credit of the family of Chhajju Singh. She described herself as a Brahmin and so forth. The Sub-Inspector sent her to another Thana, Sahaspur. She left for Sahaspur under the conduct or the arrest of a constable. Soon after the Sub-Inspector went to the railway station Rikhikesh Road with the intention of proceeding on four days' leave. He there saw the woman again and she then made statements which were to the derogation of the family aforesaid. The theory of the prosecution is that she made these latter statements at the instigation of one Pirthi Singh and hence the derived malice that turns these statements into defamation, statements made, according to the Crown, with the object of aspersing the memory of the dead and with a design to injure the feelings of the relatives of the dead. The case of *Reg. v. Labouchere* (3) is very instructive on this point, always bearing in mind that we must adhere strictly to the Indian law as laid down in S. 499, I. P. C. If the intention of the appellant was to aggrieve, if the word may be used, the feelings of the relations, is it at all likely that the woman would have done so on the first occasion she had a chance of doing it, namely, when she came to the Rikhikesh Thana, or later on as she is charged with doing? A woman bent upon causing pain to the relations of Chhajju Singh would surely have done so when she had the first opportunity of doing it. We can easily imagine her blurting out a false

(3) [1884] 12 Q. B. D. 320.

story upon the first opportunity. It is difficult to imagine her designing to get credence to her false story by first stating matters to the credit of the family and then taking advantage of an unexpected interview with the Sub-Inspector to do the opposite. She did not know of the Sub-Inspector's intention to take leave or the probability of meeting him at the railway station.

The improbability is so great that it amounts to my mind to an impossibility. Her intention was not to cause pain to the relatives, but to get herself, if she could, out of the scrape into which she had come by going about in male attire with a large amount of jewellery. In any case I cannot hold that the intention has been proved; her statements therefore do not amount to defamation. The offence of defamation of which she has been convicted has not been established. I find her not guilty and direct her immediate release from custody; if on bail, as I understand she is, she should be instantly released and the bail bonds cancelled.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 279

RICHARDS, C. J. AND BANERJI, J.
Chiranji Lal—Plaintiff—Appellant.

v.

Naraini and others — Defendants — Respondents.

Letters Patent Appeal No. 156 of 1917,
Decided on 7th February 1919.

Contract Act (1872), S. 124—Mortgage by *A* in favour of *B*—On *B*'s death, mortgage paid by *A* to *C*—*C* promising to indemnify *A* in case any person claimed money as *B*'s heir—Decree obtained against *A* by persons claiming to be heirs of *B*—*A* without discharging decree sued *C* on indemnity bond and obtained decree providing that execution not to issue unless *A* discharged decree against him—*A*'s suit is not premature.

A executed a mortgage in favour of *B*, *B* died. *A* paid the mortgage money to *C*, who claimed to be the heir of *B* and obtained from him an indemnity bond that in the event of any other person coming forward and claiming the money as *B*'s heir, *A* would be indemnified for any payment that he might be compelled to make. Subsequently certain other persons, alleging themselves to be the heirs of *B*, brought a suit against *A* claiming half the mortgage-money, and obtained a decree. *A* without discharging this decree, sued *C* on the indemnity bond, and obtained a decree which provided that execution should not issue unless and until *A* had discharged the decree made against him. On appeal the appellate Court dismissed *A*'s suit as being premature:

Held: that inasmuch as the decree which *A* had failed to discharge was a mortgage decree against his property, it was equivalent to payment and that consequently the suit was not premature, and *A* was entitled to the relief sought by him. [P 280 C 1]

Peary Lal Banerji—for Appellant.

S. M. Sulaiman for *Panna Lal*—for Respondents.

Judgment.—This appeal arises out of a suit brought on foot of a bond, which has been called, not inappropriately, an indemnity bond. It appears that there was a mortgage executed by the plaintiff in favour of one Mt. Maharani. On her death there were two sets of persons claiming to be entitled to the property held by her. One claimant was a man of the name of Kanhaia Ram. He alleged to have received payment of the entire mortgage money from the plaintiff, and there was given in evidence a receipt he executed for the full amount and the bond which is the basis of the present suit. In that bond Kanhaia Ram covenanted that if any one else put forward a claim to the money secured by the deed of mortgage and if he failed to prove his power to give a discharge and if the plaintiff should be obliged to pay any one else, then he would indemnify the plaintiff against such payment. Certain property was hypothecated to secure this covenant. In course of time a rival claimant brought a suit against the plaintiff and Kanhaia Ram based on the original mortgage, alleging that the then plaintiffs were entitled to half the property in possession of which Mt. Maharani had been and that the receipt and discharge by Kanhaia Ram was only effectual to the extent of half of the mortgage-debt. This suit was successful and a decree for sale of the mortgaged property was made and, as already stated, the plaintiff and Kanhaia Ram were defendants to that suit. The Court of first instance decreed the plaintiff's claim, but put a proviso to the decree that it could not be executed unless and until the plaintiff was obliged to discharge the decree which had been made against him. The Court of first appeal confirmed this decree. A learned Judge of this Court set aside the decrees of the Courts below and dismissed the plaintiff's suit as premature.

It seems to us that the view taken by the learned Judge of this Court was not correct. It is true that at the time the

suit was brought the decree had not actually been discharged; but it was a mortgage-deed against the plaintiff's property and it seems to us that it was highly technical to hold that the suit was therefore premature. Furthermore, the proviso which the Courts below had put upon the decree prevented the possibility of any injustice being done to the respondent. On behalf of the appellant the case of the *British Union & National Insurance Co. v. Rawson* (1) is an authority that the suit could not be dismissed as being premature. We think also the case of *Tota Das v. Babu Ganesh Prasad*, Civil Revision No. 79 of 1909, decided on 31st January 1910, unreported, is an authority in the plaintiff's favour. Dr. Sulaiman, on behalf of the respondent, has tried to support the decision of the learned Judge of this Court upon the ground that the plaintiff may not have paid the full amount stated in the receipt to Kanhaia Ram. It appears that there was a finding in the previous litigation, in which the plaintiff and Kanhaia Ram were co-defendants, that the plaintiff had not paid the full amount due upon the mortgage. As pointed out by the lower appellate Court, this decision was certainly not necessary for the purposes of that suit and, furthermore, that the plaintiff and Kanhaia Ram were arrayed on the same side. Admittedly there was some consideration for the bond sued upon in the present suit and the terms of the bond were that if a claim should be put forward and the discharge which Kanhaia Ram there was purporting to give should prove not sufficient, then Kanhaia Ram would indemnify the plaintiff from any further money he had to pay. We have already held that under the circumstances of the present case the granting of a mortgage decree against the plaintiff was equivalent to payment. We may mention here that the appellant has produced before us a certified copy of the certificate recording payment of the amount of the mortgage-deed. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court. The appellant will have his costs of both hearings in this Court.

V.B./R.K.

Appeal allowed.

(1) [1916] 2 Ch. 476.

A. I. R. 1919 Allahabad 280

RICHARDS, C. J. AND BANERJI, J.

Mohamed Subhanullah—Defendant—Appellant.

v.

Mt. Saghrunnissa Bibi—Plaintiff—Respondent.

First Appeal No. 188 of 1917, Decided on 21st March 1919, against decision of Addl. Sub-Judge, Gorakhpur, D/- 21st February 1917.

(a) **Mahomedan Law—Dower—Sunnis—No agreement that dower should be prompt—Only reasonable portion of dower be deemed to be "prompt."**

According to the Mahomedan law, amongst Sunnis, if there is no express agreement that dower should be prompt, only a reasonable portion of it should be deemed to be "prompt," and what is a reasonable portion will depend upon the circumstances of each case. [P 281 C 1,2]

(b) **Mahomedan Law—Dower—Use of words "wajibuldain" and "wajibulada" in absence of word "muajjal"—Whole dower is not to be regarded as prompt.**

The use of the words "wajibuldain" and "wajibulada" in respect of dower in the recitals of a deed is in the absence of the word "muajjal" the technical word for prompt dower, consistent with the proposition that the whole of the dower is not to be regarded as prompt. [P 282 C 2]

S. M. Sulaiman—for Appellant.

Iqbal Ahmad, Mukhtar Ahmad and J. N. Chadha—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff sued her husband to recover the sum of Rs. 35,000 being the balance of dower alleged to be due to the plaintiff. It appears that the parties were married a considerable time ago and the plaintiff has borne four sons to her husband. She alleges in her plaint that about seven or eight years ago her husband contracted an "intimacy" with another woman and from that time on he took very little interest in her. She contends that her dower was the sum of Rs. 1,25,000, but she admits that a considerable amount of this sum has already been satisfied by transferring certain property. She says that the whole of her dower was prompt and therefore she is entitled to recover the balance. The defendant contended that her dower was only Rs. 14,000; that there was no settlement as to how much of the dower should be prompt, and that in no event should the plaintiff be allowed to recover any further sum having regard to the fact that he had already transferred to her certain property in lieu of dower. It appears that on 10th December 1913 the defendant executed a sale deed in

favour of his wife, the plaintiff, transferring certain immovable property in consideration of the discharge of Rupees 90,000 dower debt, part of Rs. 1,25,000. The validity of this transfer was subsequently challenged by a creditor of the defendant who alleged that the deed had been executed for the purpose of defrauding creditors. To this suit both the plaintiff and the defendant were parties. The suit ended in the validity of the deed of transfer being upheld, the Court holding that the dower was Rupees 1,25,000. In the present suit the learned Subordinate Judge held that the decision in this previous suit operated as res judicata and he refused to allow the defendant to give evidence or to contend that the dower was anything less than Rs. 1,25,000.

We think that this decision was wrong in law and rather unfortunate. In the previous litigation the plaintiff in this suit was plaintiff and she sued a certain Bank, which was the creditor of her husband, making her husband a pro-forma defendant, she asking for a declaration that the property which had been transferred to her was her property and was not liable to be sold in execution of decree against her husband. The amount of the plaintiff's dower was only incidentally in controversy in that suit, and it is clear that there was no issue between the plaintiff and the present defendant in that suit as to the actual amount of the plaintiff's dower. The ruling of the Subordinate Judge was unfortunate because it had the result of keeping out some evidence of what was said and done at the time of the plaintiff's marriage with the defendant. It also afforded to some extent an excuse to the defendant for not entering the witness-box. In the present case, for reasons which will presently appear, we do not think that it is necessary for us to decide what was the amount of the plaintiff's dower. The real issue in the case was, "was all the dower prompt?" Involved in this issue is the issue as to whether at the time of the marriage any express settlement or agreement was come to as to whether the dower should be prompt or deferred, whether, in fact, there was any agreement one way or the other. We may state here our opinion that if there was no express agreement that the dower should be prompt then according to

Mahomedan law, amongst the Sunnis, only a reasonable portion of the dower should be deemed to be "prompt", and what is a reasonable sum for prompt dower depends upon the circumstances of each case. During argument it was contended on behalf of the respondent that in the absence of any express agreement, it should be presumed that the whole of the dower was prompt and the case of *Mirza Bedar Bukht Muhammed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan Bahadur* (1) was relied upon. That case was an Oudh case and the parties were Shias. In the present case the parties are Sunnis. A careful perusal of the case will show that the headnote is hardly borne out by the judgment of their Lordships of the Privy Council and it seems to us that their Lordships never decided that even amongst Shias, in the absence of express agreement, the whole dower is presumed to be prompt. A contrary view has always been held in this Court: see the case of *Umda Begam v. Muhammadi Begam* (2), where the authorities are reviewed. Furthermore it would seem that the view taken by Mr. Ameer Ali in his work on Mahomedan law is in consonance with the decisions of this Court. We have therefore to see whether there was any express agreement at the time of the plaintiff's marriage with the defendant that the whole of her dower should be prompt. The dower, assuming it to be (as alleged by the plaintiff) Rs. 1,25,000, was very considerable, and it was admitted by both the learned gentlemen who appeared for the parties that it would have been very unusual if the parties had declared the whole dower to be prompt, unless there was some very special reason why they should have done so, and in considering the evidence we have to bear this in mind. In our judgment no special circumstances were proved. It was hinted that the defendant had treated his first wife badly and that this might be a special circumstance, but no witness said that the relations of the plaintiff stipulated that the dower should be prompt to safeguard the plaintiff. The plaintiff produced three witnesses to prove that it was declared at the time of the marriage that the whole dower was prompt. They

(1) [1873] 19 W. R. 315=2 Suth. 823 (P.C.).

(2) [1911] 33 All. 291=9 I. C. 200.

were Kazi Imanul Haq, Sheikh Absan Ali and Kadir Ali Khan. Dealing with the first witness the learned Subordinate Judge says :

" This witness and his relations had had litigation with the defendant both in the civil and criminal Courts. I am therefore not prepared to accept his testimony unless strongly corroborated by other evidence or circumstances."

Dealing with the second witness, the Court below says :

" Kadir Ali is a dismissed servant of the defendant and is now in the plaintiff's service. Admittedly he was served with a notice by the defendant for settlement of accounts. He is a man of no means. He has abandoned his original home and has settled at Salempur. His house is in the plaintiff's uncle's zamindari. He does not appear to be either impartial or quite reliable."

We entirely agree with the Court below that these two witnesses are altogether unreliable. The third witness, Sheikh Ahsan Ali, no doubt, gave some evidence in his direct examination in favour of the plaintiff. He was asked in cross-examination :

" How do you know that the dower debt was payable on demand ?"

His answer was :

" Muhammad Salim said to Maulana Abdul Alim, that dower has been settled at Rs. 1,25,000, you have been appointed a wakil. Go and get the Nikah recited. Maulana Abdul Alim said to Subhan Ullah, the dower is fixed at Rs. 1,25,000 and Saghirunnisa is being given to you as your wife. Do you agree? He replied 'I agree.'"

If this part of the evidence of the witness be correct it is clear that there was no express declaration that the whole of the dower should be prompt. The defendant has produced three witnesses. One of these was apparently a respectable gentleman. He pays Rs. 7,000 a year as Government revenue and he is a Darbari and his income is between Rs. 23,000 and Rs. 24,000 a year. Reading his evidence and cross-examination it seems to us that he has stated that he was present at the wedding and that if anything unusual occurred, namely, any declaration that the whole dower was prompt, he would have recollected it. He was cross-examined as to his arrival at, and departure from, the wedding and the learned Judge states that he is not impartial because he could not give much detail about the persons who had joined the marriage party, that from the railway time table, a note of which has been made, it appears that he did not join the marriage party at all. It was not quite fair to the witness not

to ask him some question about the railway time-table. The time-table was not proved, and it was not shown that the time-table was for the particular year in which the wedding took place in fact there was no evidence given as to the exact year the marriage did take place. It seems to us that so far as oral evidence goes, the evidence of the defendant was more reliable than the evidence given by the plaintiff, and we agree with the Court below that the onus of showing that all the dower was prompt lay on the plaintiff.

The Court below however considers that the sale-deed of 10th December 1913 corroborates the plaintiff's story. He seems to think that the words used in the recital in that deed amount almost to an admission that all the dower was prompt. No doubt the words "wajibuldain" and "wajibulada" are used, but not the word "muajial." The latter word is the technical word for "prompt" dower. The words used, it seems to us, are quite consistent with a portion of the dower being payable, which would be the case if no express agreement had been arrived at the time of the marriage. On behalf of the appellant it is contended that the language in the sale-deed of 10th December 1913 is entirely explained by its being a document which was executed for the purpose of putting the property of the defendant out of the reach of his creditors (if it was not actually a fraud upon them.) On the other hand, it is said that at the time the defendant was possessed of other means and that the Court ought not to deal with the case on the supposition that there was any intention either to defraud creditors or even to protect the property of the defendant. We think that even if the defendant was merely satisfying his wife by making a substantial payment to her of a part of her dower, the language used in the deed is not inconsistent with there not having been any declaration one way or the other as to the dower being prompt. After carefully considering the evidence, we have come to the conclusion that there was no express agreement at the time of the marriage that the whole of the dower should be prompt.

This being so, we have to consider whether the defendant has not discharged so much of the dower which, in the circumstances of the present case, may rea-

sonably be regarded as prompt. We have already stated that the dower was very considerable. Property worth Rs. 90,000 has been transferred, which is is roughly speaking 72 per cent of Rs. 1,25,000 (assuming this sum to have been the dower.) We think that under the circumstances of the present case, and even assuming that the defendant has taken a third wife, the portion of the dower already discharged is all that ought to be considered prompt and therefore that the present suit ought not to have been instituted. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in all Courts, including in this court-fees on the higher scale.

V.B./R.K. *Appeal allowed.*

A. I. R. 1919 Allahabad 283

RICHARDS, C. J. AND RAFIQUE, J,

Sheoraj Singh and another—Plaintiffs
—Appellants.

v.

Naik Sahai and others—Defendants—
Respondents.

Second Appeal No. 86 of 1918, Decided on 17th February 1919, from decree of Dist. Judge. Budaun.

Pre-emption—Suit for — Plaintiff joining with him persons having different rights inter se—Plaintiff's right is not lost.

In a suit for pre-emption against a stranger vendee, the plaintiff does not lose his right by joining with him persons who have different rights inter se but whose rights are superior to those of the vendee. [P 284 C 1]

Sheodihal Sinha—for Appellants.

S. A. Haidar—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. It appears that there were two suits brought by rival pre-emptors, one by Munna Lal alone and the other by four other persons. In the second suit (where there were four plaintiffs) two of the plaintiffs withdrew the day after the plaint was filed. The two suits then continued, one in which Munna Lal alone was plaintiff and the other in which the remaining two plaintiffs were Sheoraj Singh and Ram Ghulam. During the trial the rival pre-emptors came to terms by which two-thirds of the property was given to Munna Lal and one-third to the other two plaintiffs out of the half of the property sold belonging to defendants 1 to 3. As to the other half of the property sold belonging to Badri Prasad (defendant 4), the claim

for pre-emption was not pressed. The first Court decreed the claim in the terms of the compromise. The vendees-defendants 1 to 3 appealed to the Judge. As against the two plaintiffs Sheoraj Singh and Ram Ghulam, the contention was that by joining the other two plaintiffs (who, as we have mentioned above withdrew immediately after the filing of the plaint) they had forfeited their rights.

This contention found favour with the lower appellate Court and it accordingly made a decree, the effect of which was that Munna Lal got all the property which had been sold to defendants 1 to 3. The plaintiff's Sheoraj Singh and Ram Ghulam have come here in second appeal, contending, first that they did not forfeit their rights by joining with them the two plaintiffs because they also were co-sharers and secondly, that in any event the amendment of the plaint cured the defect. Munna Lal is amongst the respondents and he is the only respondent who appears. He is represented by Mr. Haidar, who says that his client has no objection to the decree of the first Court being restored, provided that the decree of this Court provides that he shall be at liberty to withdraw all money which he paid in respect of any property that were given to the plaintiffs-appellants under the terms of the compromise, and also that he should not be saddled with the costs. The question we have to decide is whether or not the plaintiffs lost their right of pre-emption under the circumstances of the present case. If we assume that the two plaintiffs whose names were withdrawn after the filing of the suit were persons who must be regarded as strangers, then the case of *Bhupal Singh v. Mohan Singh* (1) is an authority that the mere joining of unauthorised persons in a suit for pre-emption is fatal and that the difficulty is not got over by subsequent amendment of the plaint by striking out of these persons' names. It is quite unnecessary for us to express any opinion as to the ruling in this case, because we think that even if all four plaintiffs had remained on the record, that fact under the circumstances of this case would not have deprived the appellants here of their right of pre-emption. It appears that all four plaintiffs were co-sharers and that the vendees were absolute strangers, having no share in the

(1) [1897] 19 All. 324.

village and having no right of pre-emption. True it may be that two of the original plaintiffs had an inferior right to Sheoraj Singh and Ram Ghulam, but we think that where the suit is a suit against strangers the plaintiffs by joining persons who have different rights inter se do not thereby forfeit their right.

The learned Judge has referred to the case of *Gupteshwar Ram v. Rata Krishna Ram* (2). In that case it was held that where the vendees had joined with them in their purchase a person who had an inferior right to the plaintiff they must be deemed to have forfeited their right as against the plaintiff. The distinction between the facts of that case and the facts in the case before us is that one set of vendees in the case quoted had equal right with the plaintiff while another set had inferior right with the plaintiff. In the present case all the plaintiffs have a right of pre-emption and the vendee had no rights at all. We cannot agree with the view taken by the learned Judge. The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance, with this modification that the plaintiffs will have one-third of the property conditional upon their paying the amount of the consideration within three months from this date. Munna Lal will be at liberty to withdraw any money which he has paid in excess of his share as a consequence of the decree of the lower appellate Court. Sheoraj Singh and Ram Ghulam will have their costs of this Court and of the Court below against defendants 1 to 3. If the money is not paid by Sheoraj Singh and Ram Ghulam within the three months allowed, their suit will stand dismissed with costs in all Courts. As between Munna Lal and Sheoraj Singh and Ram Ghulam each party will pay his own costs in this Court and in the Court below.

V.B./R.K. *Appeal allowed.*

(2) [1912] 34 All. 542=15 I. C. 174.

A. I. R. 1919 Allahabad 284

PIGGOTT AND WALSH, JJ.

Sakhawat Ali—Opposite Party—Appellant.

v.

Radha Mohan and another—Applicants—Respondents.

First Appeal from order No. 19 of 1918
Decided on 29th October 1918.

Provincial Insolvency Act (1907), Ss. 22 and 46—"Person aggrieved" must be person suffering legal grievance—Administration of insolvent's estate—He has no interest in property vested in trustee and cannot be aggrieved by sale.

A person aggrieved, within the meaning of Ss. 22 and 46 must be a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something. The expression does not include a man who is disappointed of a benefit which he might have received if some other order had been made. [P 285 C-1]

During the administration of an insolvent's estate, the insolvent has no legal interest in the property vested in the trustee, and no locus standi in the administration of the estate. He cannot therefore be aggrieved by the sale of property in which he has no interest, and has no locus standi to object to the sale or to prefer an appeal against an order dismissing his objection. [P 285 C 1]

Iqbal Ahmad—for Appellant.

Sital Prasad Ghosh, Purushottam Das Tandon and Harnandan Prasad—for Respondents.

Judgment.—This is an appeal against an order of the District Judge of 12th November 1917 brought by two persons who have been adjudicated insolvents. The application to the insolvency Court, on which the order was made, was called "objections." It asked the Court not to confirm a sale which had taken place under the direction of the receiver of certain property which had belonged to the insolvents. The grounds upon which the application was made were: (1) certain alleged irregularities in the sale and (2) sale at an alleged undervalue. The objections were dismissed and the sale confirmed. In our opinion the insolvents have no right of appeal to this Court. Further, they had no right to make the original application. An insolvent can always tender himself as a witness. But this would not make him a party. The original application erroneously describes the insolvents as "opposite parties" and alleges that the sale is "calculated to cause them severe loss." A moment's reflection will show that this is an untenable proposition. As a matter of law, during the administration of an insolvent's estate, an insolvent has no legal interest in the property vested in the trustee, and no locus standi in the administration of the estate. S. 22, Provincial Insolvency Act, enables the insolvents to make an application to the insolvency Court against any act or decision of the receiver "if he is aggrieved" by such

act or decision. He cannot be aggrieved in the legal sense of the word in the sale of property in which he has no interest. This Court decided in *Jhabba Lal v. Shib Charan* (1) that a creditor has no locus standi apart from the receiver in an application made by a stranger to the bankruptcy claiming adversely to the estate and therefore no right of appeal against a decision on such application, which he did not like.

It was their laid down, adopting the decision of James, L. J., in an English case cited in the judgment, that "a person aggrieved" within the meaning of Ss. 22 and 46 must be a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, but that the words do not mean a man who is disappointed of a benefit which he might have received if some other order had been made. Similarly it has been held in *Ladu Ram v. Mahabir Prasad* (2) that a creditor who makes a complaint of misconduct against an insolvent is not a person aggrieved and entitled to appeal if the insolvency Court dismisses the complaint. The right of appeal is alleged to exist in this case under S. 46 (3). Leave to appeal has been given but leave cannot create a right which has not otherwise been conferred by the Act.

The Act being framed upon the English measure, the principles and policy of the English Bankruptcy law must be followed where they are not inconsistent with the express provisions of the Act. It was suggested in argument in support of the appeal that the insolvent has an interest in the surplus which may arise after distribution. It has long been settled by the English Court of appeal that this view, as a matter of law, is unsound. He has no legal interest but merely a hope or expectation: see *ex parte Sheffield In re Austin* (3). The same Court in *Leadbitter & Harvey In re* (4) decided that although an insolvent was entitled to the surplus, he was not a party interested in the costs of an insolvency proceeding. James, L. J., said: "A bankrupt can do nothing to embarrass the

administration of the estate. The mischief would be enormous." We think that this observation applies with even greater force in India where the facilities for appeal and delay are greater. We hold that the insolvents in this case were not "persons aggrieved" within the meaning of Ss. 22 and 46, Provincial Insolvency Act, and upon this ground the appeal must be dismissed. We dismiss it accordingly with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 285

RICHARDS, C. J. AND BANERJI, J.
Mukhram—Defendant—Appellant.

v.

Chajju and others—Plaintiffs—Respondents.

First Appeal from Order No. 173 of 1918, Decided on 11th April 1919, from order of Addl. Dist. Judge, Saharanpur, D/- 23rd August 1918.

Agra Tenancy Act (1901), S. 34—Person occupying land without consent of landlord—Rent not claimed nor recovered—S. 34 does not deprive landlord of the right to sue for ejectment in civil Court—Previous suit in Revenue Court that defendant might be deemed tenant and ejected does not operate as res judicata—Civil P. C. (1908), S. 11.

The relationship of landlord and tenant under the Agra Tenancy Act only commences after rent has been paid or assessed, and S. 34 of that Act does not deprive a landlord of his right to sue in the civil Court for the ejectment of a person who has occupied land without his consent and from whom he has neither claimed nor received rent. Such a suit would not be barred by the rule of res judicata merely because the plaintiff had previously brought a suit in the Revenue Court asking that the defendant might be deemed a tenant and ejected. [P286 C1]

Nihal Chand—for Appellant.

S. A. Haidar—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiffs claimed a declaration of their title to a certain land and ejectment of the defendant. It would seem as if the real facts were that the land originally belonged to the defendant's predecessors, who sold their zamindari to the plaintiffs or their predecessors in title. The plaintiffs allege that the defendant has recently got his name entered as a tenant and that he has laid claim to the property in dispute. The defendant has put in many pleas including a plea of limitation. He also pleaded that the suit was not cognizable in the civil Court and is barred by res judicata. It appears that the plaintiffs brought a previous suit in the Revenue Court for the

(1) [1917] 39 All. 152=37 I. C. 76.

(2) [1917] 39 All. 171=37 I. C. 996.

(3) [1879] 10 Ch. D. 434.

(4) [1879] 10 Ch. D. 388.

ejection of the defendant. In that suit the plaintiffs stated that the defendant was occupying the land in dispute without their consent and asked that he might be deemed to be a tenant and ejected.

The Court of first instance, when hearing the present suit, held that the latter was barred by the rule of *res judicata*. The lower appellate Court set aside the decree of the Court of first instance and remanded the case for hearing on the merits. We think that the order of the Court below was correct. If the allegations of the plaintiffs in the present suit turn out to be correct, the claim is clearly one for ejection against a person who never was a tenant of the plaintiffs. It is urged that the bringing of the previous suit to which we have referred of itself executed the relationship of landlord and tenant between the plaintiffs and the defendant. S. 34 does not say that the relationship of landlord and tenant shall commence before a person occupying the land without the consent of the landlord pays rent; on the contrary the provisions of the section seem to imply that no such relationship can commence at least until after rent has been paid or assessed. No doubt the section enables a landlord to recover rent or compensation from a person, who occupies land without his consent, if so he pleases, but the section does not take away the landlord's right of bringing a suit for ejection in the civil Court, if he chooses to take that course, without having claimed or received rent. It seems to us therefore that the previous litigation in the Revenue Court cannot operate as *res judicata* or bar the maintenance of the present suit. We do not express any opinion on the merits which, of course, have not been gone into. We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 286

PIGGOTT AND WALSH, JJ.

Mahadeo Misir and others — Defendants.

v.

Dirgpal Pande — Plaintiff — Respondent.

First Appeal No. 80 of 1918, Decided on 8th January 1919, from order of Addl. Judge, Gorakhpur.

N. W. P. Rent Act (1881), S. 9—Will contravening prohibition against transfer of right of occupancy—Terms are void.

The provisions of S. 9 rendered void the terms of any will in existence on the date on which

that Act was passed, if those terms contravened the prohibition against the transfer by will of a right of occupancy which was thereby enacted.

[P 287 C 2, P 288 C 1]

Saila Nath Mukerji—for Appellants.

Surendra Nath Sen—for Respondent.

Judgment.—This is a first appeal against an order of remand passed by the District Judge of Gorakhpur in an appeal from a decision of the Munsif of Deoria. The suit in question arose in the following way: One Gayadat Pande was an occupancy tenant in the village of Kasia. He died in or about the year 1814 A. D., and, in so far as the land in suit is concerned, it is an admitted fact that this land passed into the occupation of his widow, Mt. Rajpali, who was recorded as tenant of the same and remained ostensibly in possession as tenant for a long period of years. The said Rajpali died in 1915 and since her death conflicting claims to the possession of this land have been put forward by Drigpal Pande, a nephew of the deceased, on the one hand, and on the other hand by the defendants-appellants, who are the daughter and the daughter's sons of the aforesaid Gayadat Pande and Mt. Rajpali. The case set up in the plaint was essentially this, that Gayadat had died while a member of the same joint undivided Hindu family as the plaintiff Drigpal, that the land in suit had devolved by survivorship on the death of Gayadat upon the said plaintiff, as part of a larger area which formed the joint occupancy holding of the family. The plaintiff alleged that on the death of Gayadat he had obtained peaceable possession of the entire holding, including the land in suit, and had given the widow Rajpali nothing but what she was entitled to under the Hindu law, namely, maintenance as a widow belonging to the joint family. The plaint goes on to assert that some two years after the death of Gayadat Pande, there was a dispute between the plaintiff and Mt. Rajpali as to the maintenance to be enjoyed by the latter, and that the plaintiff then assigned the land in suit to Mt. Rajpali in lieu of the maintenance to which she was entitled. In effect therefore the plaintiff's case was that the land in suit had continued as a matter of law, ever since the death of Gayadat Pande, to form part of an occupancy holding, including this and other land, of which the tenant was the plaintiff Drigpal. He

admitted the fact of Mt. Rajpali's possession as regards the land in suit. He pleaded that her possession was permissive only and enjoyed by her in lieu of her right to maintenance.

If so of course Mt. Rajpali had no rights as tenants of the land in suit which could devolve upon any one on her death and the plaintiff was entitled to resume possession of this land on the death of Mt. Rajpali, merely on the ground that Mt. Rajpali's right to maintenance was extinguished by her death and that the plaintiff continued to be, as he had been all long, the occupancy tenant of the land in suit. Unfortunately as it has turned out, the plaintiff's case was complicated by a reference made in para. 3 of the plaint to a will which Gayadat Pande had left behind him. All that is really said about this will is to the effect that Gayadat himself had made it clear in the said will that the land in suit formed only part of the joint occupancy holding of the family and that although Mt. Rajpali might after his death be entitled to maintenance out of the joint occupancy holding, she would not enjoy full rights of ownership over any portion of the same or have any power of alienation. When the case went to trial it would seem as if the plaintiff was allowed more or less to shift his ground and to set up a right of succession under the will, independently of, or as an alternative to the main case outlined in the plaint. The trial Court fixed two issues which it decided together. One of these dealt with the jointness or separation of the family and the other with the question whether, in any event, any claim which the plaintiff might have to the land in suit had or had not been extinguished by many years of adverse possession on the part of Mt. Rajpali. There was further a separate issue on the question of the will. On the two issues which he tried together the learned Munsif found against the plaintiff. He held that the case of jointness set up in the plaint was not proved and that, in any event, Mt. Rajpali had held the land in suit adversely to the plaintiff from the date of her husband's death and had acquired, as against the plaintiff, a good title by adverse possession. With regard to the will the finding was, in the first place, that it had not been proved; in the second place, that the evidence was not

sufficient to show that the land in suit was included in, or formed any part of, the holding referred to in that will, and, in the third place, that the will had never been acted upon. This last finding seems to be a repetition in another form of the finding in favour of the adverse possession of Mt. Rajpali. The first Court having dismissed the suit, the plaintiff brought the matter before the District Judge in first appeal. In his memorandum of appeal he most distinctly challenged the finding of the trial Court on the question of jointness or separation between his uncle and himself. He further pleaded that the genuineness of the will should have been presumed and that the Court below was in error in supposing that the terms of the will had not been acted upon, inasmuch as the possession allowed to Mt. Rajpali over the land in suit had been merely the possession in lieu of maintenance which the will admitted to be her right.

The learned District Judge began by presuming the genuineness of the will. It was a document 70 years old produced from proper custody. We have not been asked to interfere with the presumption in favour of its genuineness drawn by the lower appellate Court. That Court however was in error in supposing that it could find a short cut to a decision by basing the plaintiff's case only upon the will. The learned Additional Judge says that, at the time when this will was executed, there was no statutory prohibition to the transfer of an occupancy holding, by will or otherwise. He assumes in favour of the plaintiff that the will does refer to the land in suit, and he interprets it as bequeathing this land to the plaintiff, subject to a right of maintenance in favour of Mt. Rajpali. Now, to go no further back than the Rent Act 18 of 1873, it is beyond question that in that year the legislature expressly prohibited the transfer of a right of occupancy, such as that with which we are concerned in this case, by grant, will or otherwise, except as between persons who have become by inheritance co-sharers in such right. This prohibition was repeated in more general terms in S. 9, N. W. P. Rent Act (12 of 1881). We think it clear, as a question of law, that these statutes rendered void the terms of any will in existence on the date on which they were passed, if those

terms contravened the prohibition against transfer by will which was thereby enacted. It follows that the plaintiff cannot succeed in this case on the strength of the will alone, apart from the case of jointness between himself and his uncle set up in the plaint.

The lower appellate Court, in spite of the opinion which it formed regarding the terms of the will, has not decreed the plaintiff's claim, but has passed an order of remand, because it was of opinion that further inquiry was needed on a point raised by the defendant's pleadings, namely whether the land in suit had actually formed part of the old occupancy holding as it existed in the lifetime of Gayadat Pande, or was land in which Mt. Rajpali had herself acquired occupancy right by occupation of the same for the statutory period of 12 years. This is really stating in another form the question which the lower appellate Court seemed in a previous portion of the judgment to have decided in favour of the plaintiff, when it assumed that the land in suit was part of the land referred to by the provisions of the will. However this may be we are satisfied, in the first place, that the order of remand cannot be affirmed; in the second place, we are not of opinion that we are in a position to restore the decree of the first Court. The plaintiff is entitled to a finding of fact by a Court of first appeal on the question of jointness or separation, and on the question of the nature of Mt. Rajpali's possession as tenant of the land in suit, namely whether the possession was adverse to the plaintiff or permissive on his part. These questions have not been considered at all by the lower appellate Court in consequence of what was, in our opinion, an erroneous view taken by that Court as to the effect of the will. Our order therefore is that we set aside the order of remand passed by the learned Additional Judge and remand the case to that Court to be readmitted to his file of pending appeals and disposed of according to law, subject to the observations made by us in this judgment. Costs here and hitherto shall abide the event of the suit.

V.B./R.K.

Case remanded.

A. I. R. 1919 Allahabad 288

RAFIQUE AND WALSH, JJ.

Ajudhia Puri—Plaintiff—Appellant.

v.

Brij Bhukhan and others—Defendants—Respondents.

Second Appeal No. 642 of 1917, Decided on 1st May 1919, against decision of Sub-Judge, Mainpuri, D/- 4th April 1917.

Agra Tenancy Act (1901), S. 167—Person declared tenant by Revenue Court and nature of tenancy determined—S. 167 bars suit for declaration that he is not tenant—Jurisdiction, Revenue and Civil.

A person who has been declared a tenant by the Revenue Court in a suit between the parties, and the nature of his tenancy has also been determined, cannot subsequently ask the civil Court for a declaration that he is not a tenant. S. 167, Agra Tenancy Act debars him from suing in the civil Court. [P 289 C 1]

Gokal Prasad—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—The facts which have given rise to this appeal are as follows : The defendants-respondents are the zamindars of the village Bidhuna. The plaintiff-appellant was, prior to 1313 Fasli, entered in the revenue papers as muafidar of plot No. 757. In the year 1313 Fasli when he was a minor, one Raghubarpuri entered into an agreement with the zamindars on behalf of the plaintiff-appellant as his guardian, undertaking to pay rent in respect of plot No. 757. Ever since then the plaintiff's name has been shown in the revenue papers as that of a tenant in respect of plot No. 757. In 1915 the zamindars distrained the crops of the plaintiff for arrears of rent. Thereupon the plaintiff contested the distraint under S. 142, Tenancy Act and raised the question of his tenure with regard to plot No. 757. He stated that he was a muafidar of the plot and that Raghubarpuri was not his guardian and had no right to enter into an agreement with the zamindars on 24th October 1905, giving up on behalf of the plaintiff the rights of a muafidar and undertaking to pay rent of plot No. 757. The Revenue Court went into the question of the validity of the agreement and held against the plaintiff. The application of the latter contesting the distraint was disallowed. After the decision of that case, the suit out of which this appeal has arisen was filed by the plaintiff on 9th August 1916 against the defendants-respondents, the zamindars of the

village, for a declaration that plot No. 757 was his muafi and that the defendants had no right to take any rent in respect of that plot. The plaintiff based his claim on the allegation that Raghubarpuri was not his guardian either appointed by a Court or under the Hindu law and had no right to enter into an agreement with the zamindars on behalf of the plaintiff and to relinquish the muafidari rights.

The defendants resisted the claim on various pleas. They maintained that Raghubarpuri was the guardian of the plaintiff and during the latter's minority did all the business for him and could enter into an agreement with the zamindars, and that the agreement entered into by him was a valid agreement binding upon the plaintiff. They further pleaded limitation, res judicata and the want of jurisdiction in the civil Court to try the suit. The Court of first instance dismissed the claim. On appeal its decree was confirmed. The lower appellate Court did not refer to the question of jurisdiction. It decided the plea of limitation in favour of the plaintiff, but held that the claim was barred by res judicata inasmuch as the decision of the distraint case on appeal by the District Judge was a decision of a competent Court empowered to hear the present case. The learned Judge also decided in favour of the plaintiff the question of the validity of the agreement of Raghubarpuri. He held that Raghubarpuri was not the guardian of the plaintiff and was not authorized to come to terms with the defendant zamindars and that the agreement was not binding upon the plaintiff. In second appeal to this Court it is contended that the claim of the plaintiff is not barred by res judicata.

We may at once concede the correctness of this contention. The learned counsel for the respondents who has argued the case with great ability, has however urged that he can support the decree of the lower appellate Court on another ground, namely, that of want of jurisdiction in the civil Court to try the present suit. He relies upon the provisions of S. 167, Tenancy Act. He contends that the former suit of the plaintiff in the Revenue Court was brought under S. 142, Tenancy Act; that is one of the suits mentioned in Sch. 4 of the Act. In that case the very points that the

plaintiff now seeks to raise were decided, namely, whether the agreement of 1904-05 given by Raghubarpuri was binding on the plaintiff and whether the plaintiff was a tenant of the respondents. He cannot by merely changing the form of his relief evade the provisions of S. 167, Tenancy Act. In the present case he asks for a declaration that plot No. 757 is his muafi and that he is not liable to pay rent in respect of it. In other words, he wants to have his tenure of the plot No. 757 determined by the civil Court. The same question was before the Revenue Court in the distraint case and was decided against the plaintiff. The learned counsel also relies upon the provisions of S. 95, Rent Act, and on the case of *Ram Singh v. Girraj Singh* (1). For the plaintiff-appellant the reply is that he could not go to a Revenue Court to ask for a declaration that he was a muafidar. S. 95, Rent Act, applies only to cases where the relationship of landlord and tenant is admitted. As to S. 167, the answer is that the present suit is not of the nature of the suits mentioned in Sch. 4. The real question in the case is whether a party who has been declared by the Revenue Court to be a tenant can come to a civil Court subsequently and ask for a declaration that he is not a tenant at all. In the present case the plaintiff has been declared a tenant by the Revenue Court in the litigation between the parties and the nature of his tenancy is determined and we think that S. 167 does stand in the way of the plaintiff in the present litigation. We therefore hold that there is no substance in the appeal. We dismiss it with costs including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

(1) A. I. R. 1914 All. 483 = 26 I. C. 731 = 37 All. 41.

A. I. R. 1919 Allahabad 289

BANERJI AND PIGGOTT, JJ.

Jagdip Narain Rai and others—Defendants—Appellants.

v.

Ram Sarup Khan and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 135 of 1916, Decided on 23rd April 1919 against decision of Sub-Judge, Ghazipur, D/. 15th February 1916.

(a) Regulation (17 of 1806) — Mortgage—Application for foreclosure—Title of mortgagee becomes absolute upon expiry of year of grace.

If, upon an application for foreclosure, proceedings are held in accordance with the provisions of Regulation 17 of 1806, the title of the mortgagee becomes absolute upon the expiry of the year of grace, although no suit is brought by the mortgagee for a declaration of his right as absolute owner of the mortgaged property. [P 290 C 2]

(b) Regulation (17 of 1806) — Mortgage — Application for foreclosure — Defective service of notice—Title of mortgagee is not absolute—Burden of proof of service of notice is on mortgagee.

Where, upon an application for foreclosure, notices were issued to R and S and four others, the mortgagors, and an endorsement on the notices on behalf of those on whom they purported to be served showed that three notices and a copy of the petition were received by R for himself and two others and the remaining three notices were received by S for himself and two others.

Held : (1) that due service of the notice had not been effected upon all the mortgagors, and that therefore the mortgage had not been foreclosed, nor had the mortgagee acquired the absolute ownership of the property :

(2) that it lay upon the mortgagee to prove that notice of foreclosure had been duly served upon the mortgagors. [P 291 C 1]

Lakshmi Narain and O'Connor—for Appellants.

Tej Bahadur Sapru and U. S. Bajpai—for Respondents.

Judgment.—This appeal arises out of a suit for redemption of a mortgage by way of conditional sale made on 19th January 1861. The mortgagees made an application for foreclosure proceedings under Regulation 17 of 1806 on 25th May 1882. Notice of those proceedings was issued as required by the provisions of the Regulation and on 15th July 1882, the District Judge recorded an order to the effect that the proceedings had taken place. If these proceedings were regularly held and notice was properly served, the title of the mortgagees by way of conditional sale became absolute on the expiry of the year of grace. It is however contended on behalf of the respondents that as the mortgagees did not institute a suit for a declaration of their right as absolute proprietors of the mortgaged property, the mortgage must be deemed still to subsist and the mortgagors or some of them are entitled to redeem the mortgage. Reliance is placed on the ruling of their Lordships of the Privy Council in *Forbes v. Ameeroonnissa Begum* (1). That ruling

was considered by this Court in several cases which were referred to in the judgment of the Full Bench in *Ali Abbas v. Kalka Prasad* (2). In that case it was held that the title of a mortgagee became absolute upon the expiry of the year of grace, if the foreclosure proceedings were held in accordance with the provisions of Regulation 17 of 1806. That, no doubt, was a case in which pre-emption was claimed in respect of a sale which had become absolute after the holding of foreclosure proceedings, but the question as to the date when the title of the mortgagees as absolute owners of the property accrued had to be decided and was decided. This ruling was approved of by their Lordships of the Privy Council in *Batul Begum v. Mansur Ali Khan* (3). In that case their Lordships referring to the year of grace observed as follows :

"The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question."

The matter is therefore concluded by the last mentioned decision and we must hold that, although no suit was brought by the mortgagees for a declaration of their right as absolute owners of the property, they acquired such right upon the expiry of the year of grace, provided, of course, that the proceedings upon the application for foreclosure were held in accordance with law. The Court below has decreed the plaintiff's claim upon the finding that due service of notice of foreclosure had not been proved. It was held by the Privy Council in *Norendra Narain Singh v. Dwarka Lal Mundur* (4) that the functions of the Judge under S. 8, Regulation 17 of 1806, were purely ministerial. In the judgment in that case it was observed as follows :

"Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte* ; and even if the Judge examined the Nazir or the person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as

(2) [1892] 14 All. 405 (F.B.).

(3) [1902] 24 All. 17=28 I. A. 248 (P.C.).

(4) [1877-78] 3 Cal. 397=5 I. A. 18 (P.C.).

(1) [1863-66] 10 M. L. A. 340=5 W. R. P. C. 47 (P.C.).

to be *prima facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate."

Having regard to these observations of their Lordships, it lay heavily upon the mortgagees in this case to prove that the notice of foreclosure was duly served upon the mortgagors. The proceeding recorded by the District Judge in which he stated that the notice had been duly served would, in view of these remarks, be of very little weight in determining that the notice was duly and properly served. As has been stated above, upon the filing of the petition of 25th May 1882 notice was issued to the mortgagors. That notice is printed at p. 8 of the appellant's book and at p. 9 we find an endorsement made on the notice on behalf of those on whom it purported to have been served. The translation of the endorsement as given at p. 9 of the appellants' book is not very accurate. We have referred to the endorsement as made in Hindi and we agree with the learned Subordinate Judge that the endorsement was to the effect that three notices and a copy of the petition were received by Rupan Khan for himself and for Mt. Lakhpatri and Mt. Sobhagi and the remaining three notices were received by Swarath Khan for himself and for Chikhuri Khan and Mt. Gunjasi Kunwar. This endorsement therefore shows that notice was not served upon all the mortgagors, but only upon two of them. It seems that those who were acting in the interest of the mortgagees felt this difficulty and they accordingly got the serving officer to make a return in the terms mentioned in the report of service dated 22nd June 1882 printed at p. 10 of the appellants' book. In that return, it was stated that the Musammats took the notices intended for them behind the door leaves and the males took them in the presence of the witnesses mentioned in the return. The serving officer was one Durga, who is now dead; his evidence therefore could not be recorded in the present case.

This report is inconsistent with the endorsement as to receipt of notice as contained on the back of the notice, written out by the Patwari Sheoambar Das. The Patwari Sheoambar Das and the persons who are said to have witnessed the endorsement are all dead. The

defendants however have examined two witnesses with a view to prove that the notices were actually served upon the three female mortgagors and the three male mortgagors personally. These witnesses are Ram Lakhan Rai and Behari Rai. These two witnesses profess to bear out the report of the serving officer, but their statements are contradicted by the endorsement on the notices to which we have already referred. Furthermore, as pointed out by the learned Subordinate Judge, Ram Lakhan Rai has the same interest as the mortgagees in this case and therefore his statement should be looked upon with great caution. There remains the evidence of Behari Rai. The learned Subordinate Judge has given cogent reasons for disbelieving this witness and we agree with him. We are also of opinion that the return of the serving officer and the statements made by the two witnesses are not credible.

The learned counsel for the appellants has asked us to take into consideration the statements contained in two depositions recorded by the District Judge in the course of the foreclosure proceedings. Those are the depositions of Alyar and Bhadesar Rai. These two persons are dead and the depositions are sought to be used as evidence under the provisions of S. 33, Evidence Act. No doubt, the mortgagors were parties to the proceedings relating to foreclosure, but it must be shown, in order to make the evidence of these two witnesses admissible, that they had an opportunity of cross-examining the witnesses. If, as it is contended on behalf of the plaintiffs, notice of foreclosure was not duly served on them, these depositions cannot be used as evidence to prove service of notice. We are therefore of opinion that these two depositions cannot be used in this case and the learned Subordinate Judge was right in not referring to them in his judgment. The next piece of evidence on which the appellants rely is a proceeding recorded in 1892 by the revenue authorities in regard to the entry of names of some of the mortgagees in respect of a portion of the mortgaged property. The order passed in 1892 appears to have been based on the foreclosure proceedings held in 1882. This order therefore can carry very little weight. Reference is made to a mortgage deed executed in 1894, but we do not think that that document carries us any

further. Upon a consideration of the whole of the evidence we are of opinion, in concurrence with the findings of the Court below, that proper service of notice on all the mortgagors has not been established and therefore it cannot be held that the mortgage has been foreclosed and the defendants have acquired the absolute ownership of the property. The plaintiffs, who represent some of the mortgagors, are entitled to the decree for redemption granted to them by the Court below. We dismiss the appeal with costs, including in this Court fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 292

RICHARDS, C. J. AND RAFIQUE, J.
Amirullah—Defendant—Appellant.

v.

Rasul Baksh—Plaintiff—Respondent.

First Appeal from Order No. 141 of 1918, Decided on 26th February 1919, against order of Dist. Judge, Gorakpur, D/- 30th July 1918.

Transfer of Property Act (1882), Ss. 66 and 68—Mortgagee in possession discovering defect in title of mortgagor with respect to portion of mortgaged property—His duty is to demand fresh security and not to take secret mortgages from persons supposed to be owners.

Where a mortgagee, after receiving possession of the mortgaged property and continuing in possession undisturbed by the mortgagor or any other person, discovers a defect in the title of the mortgagor in respect to a portion of the property, his obvious duty is to demand fresh security from the mortgagor, and not to take secret mortgages from persons whom he supposes to be the owners, as such transactions are calculated to prejudice the possession of the mortgagor.

[P 293 C 1]

Haribans Sahai—for Appellant.

S. M. Sulaiman and *Iswar Saran*—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiffs seeks to sell certain property which was mortgaged to him. The mortgage was made in the year 1903 and consisted of two rooms (Nos. 35 and 36). The mortgage was in form usufructuary. It is admitted that the mortgagor put the mortgagee into possession. It is admitted that the mortgagee's possession has never been disturbed, but the plaintiff alleges that in the year 1905 (that is two years after the mortgage and twelve years prior to the institution of the present suit) he discovered that there was a defect in the

mortgagor's title to one of the rooms, namely, No. 36 and that the mortgagor's title to No. 35 was only to the extent of two-thirds. He alleges that having made this discovery he went to the persons whom he supposed to be the owners of No. 36 and the owners of the one-third of room No. 35 and that he took benami usufructuary mortgages of No. 36 and of one-third share in room No. 35. He does allege in his plaint that after he had taken these mortgages, he called the attention of the defendant to the defect and asked for redress but the mortgagor paid no heed. He does not state when this was done or what was the nature of the redress which he asked for. There is no allegation in the plaint that as soon as the alleged defects were discovered, the plaintiff asked his mortgagor either to return him his money or to give him further security.

The relief claimed by the plaintiff is somewhat startling. He asks that he should be entitled to realize his claim not by the sale of the entire property but only by sale of the two-thirds of room No. 35 to which he admits the mortgagor's title. Under the mortgage the income of the rooms was to go towards the payment of the interest on the principal sum. The plaintiff has quietly applied this income in reduction of the mortgages which he obtained from third parties, and not against the interest on the mortgage and the debt. The first Court dismissed the plaintiff's suit. The lower appellate Court set aside the decree of the first Court and remanded the case, apparently thinking that evidence would have to be gone into. If on the plaintiff's own allegations he was not entitled to maintain the suit, the Court of first instance was justified in dismissing the suit even without going into evidence, and it is from this aspect that we are considering the present appeal. S. 68, T. P. Act, prescribes under what conditions a mortgagee in possession can ask for the sale of the mortgaged property. The provision is that:

"where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person,"

and also:

"where by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially

destroyed or the security is rendered insufficient as defined in S. 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt and if the mortgagor fails to do so, may sue him for the mortgage money."

It is quite clear on the admitted facts that possession was given to the mortgagee and that he was not disturbed by the mortgagor or any other person. The mortgaged property has not been wholly or partially destroyed and it seems to us more than doubtful whether the alleged discovery of some defect of title is a "rendering of the security insufficient" within the meaning of the section. Even if it is, it was then the duty of the mortgagee to come to the mortgagor and to ask him to give fresh security. It is admitted that this was never done—at least not until after the mortgagee had gone to the rival claimants to the property and had secretly taken mortgages from them. It seems to us that nothing could be more inequitable than the conduct of the plaintiff-mortgagee in the present case. He clearly had no right to take these secret mortgages and his bona fides may very much be doubted by the fact that instead of coming to the mortgagor, when he alleges he discovered the defect, he did not do so until after he had entered into transactions with third parties which were calculated to prejudice very much the position of the mortgagor. We think that the Court of first instance was quite correct in dismissing the plaintiff's suit. We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 293

RICHARDS, C. J. AND BANERJI, J.

Gobardhan Das and others—Plaintiffs—Appellants.

v.

Anmole Singh and others—Defendants—Respondents.

First Appeal No. 145 of 1916, Decided on 19th December 1918, from a decree of Sub Judge, Ghazipur.

Mortgagor and Mortgagee—Purchase of portion of equity of redemption—Decree on foot of prior mortgage paid off by purchaser—Decree on foot of subsequent mortgage made absolute—Order making decree on first mortgage absolute in favour of purchaser is illegal that decree having been discharged.

In 1903 defendants purchased a share in cer-

tain property, which was included in two mortgages in favour of the plaintiffs. Plaintiffs had in the meantime obtained a decree on foot of the prior mortgage, which had been made absolute. In 1906, the defendants paid off that decree. Subsequently the plaintiffs obtained a decree on foot of the second mortgage, which was made absolute and in execution whereof the plaintiffs purchased a portion of the mortgaged property. The defendants were made parties to this suit. Before the purchase by the plaintiffs however the defendants obtained an order, without making the plaintiffs parties to the application, that the decree on foot of the first mortgage be made absolute in their favour, and in pursuance of that order sought to put the property up to sale. Plaintiffs thereupon brought a suit for a declaration that the decree on the foot of the first mortgage could not be executed as against them and that the defendants were not competent to bring the property to sale under that decree.

Held, (1) that the decree on the foot of the first mortgage having been discharged by the defendants had become incapable of execution and that therefore the order making the decree absolute in favour of the defendants was illegal; [P 294 O 2]

(2) that the defendants had no right to bring the property to sale in execution of the first decree. [P 295 C 1]

Tej Bahadur Sapru—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—The facts connected with this appeal are extremely complicated but as they are admitted and the only question involved is one of law, they can be stated with little detail. There were three mortgages, one of the year 1874, one of the year 1886 and one of the year 1888. They were in favour of the same mortgagees (who, as a matter of fact, were the predecessors-in-title of plaintiffs 1 and 2). In the year 1903 the father of the respondents purchased an 8-anna share in mauza Beli, which was part of the property included in all three mortgages. This purchase was by private treaty. A decree was obtained in the year 1895 on foot of the first mortgage, and that decree was made absolute in 1896. Subsequently another decree was obtained on foot of the other two mortgages in 1906 and made absolute in 1907. The plaintiffs in the present suit purchased at an auction sale, held in execution of this last mentioned decree, certain portion of the mortgaged property. Their purchase was in 1911. Before that however in 1906 the father of the respondents had paid off all that remained due on foot of the decree of 1895 in order to save the property he had purchased in 1903 from being sold. The plaintiffs, who were decree-holders in the decrees obtained on foot of the mort-

gages of 1886 and 1888, made the father of the respondents a party to their suit and execution proceedings because he was in possession of portion of the mortgaged property. Before the sale he became interested in the property in another way, namely, because he had paid off all that remained due on foot of the decree of 1895.

Whether the father of the respondents could or could not have taken any steps in the execution proceedings, which would have safeguarded him as regards the payment he had made in discharge of the decree of 1895, is not very clear but as a matter of fact nothing was done. The respondents, however in 1909 applied to the Court for an order declaring the decree of 1895 to be absolute in their favour. The object of this application was, of course, to enable, if possible, the respondents to execute the decree of 1895 and so to recover the Rs. 7,000 odd which had been paid to save the 8 annas share in mauza Beli. The respondents did not make the plaintiffs party to this application and an order was made by the Court in the terms asked for in the absence of the plaintiffs. Subsequently when the plaintiffs found that the respondents, in pursuance of the order they obtained, were about to put the property up to sale, they instituted the present suit for a declaration that the decree of 1895 could not be executed as against them and that the defendants were not competent to bring the property to sale under that decree. The Court below has dismissed the plaintiff's suit. In appeal it has been contended that the defendants have no right to bring the property to sale under the decree of 1895, and that if the respondents had any remedy they should have asserted it when they were made parties to the execution proceedings when the plaintiffs were executing the decrees obtained on foot of the mortgages of 1886 and 1888. The case is by no means free from difficulty.

There can be no doubt that the father of the respondents paid off a substantial sum which was due on foot of the decree obtained on the earliest mortgage of the three, that is the mortgage of 1874; and it would appear that he has (or at least had), some equity, provided he was able to enforce it. All that we have now to decide is whether or not he can enforce it by bringing the property to sale on

foot of the decree of 1895 in the events which have happened. A moment's consideration will show that when the father of the respondents paid the sum of Rs. 7,000 odd, the payment had the effect of fully discharging the decree of 1890. The decree having been discharged it was incapable of being executed. Mr. Agarwala asked us to hold that in the events which have happened the decree had vested by operation of law in the father of the respondents within the meaning O. 21, R. 16. and that, therefore they ought to be allowed to execute the decree and that their application to the Court was in effect an application to execute the decree. We cannot hold that the father of the respondents became the transferee of the decree. In the first place there was no transfer, and in the next place, as already stated, the decree ipso facto came to an end with the payment of the money. The decree was fully satisfied and could not be further executed by the decree holder or any other person. What the father of the respondents ought to have done (if he could) was to have paid the money to the decree holders and taken a transfer from them instead of paying the money into Court, in which case he would clearly be entitled to execute the decree. It seems to us that the order of the Court making the decree absolute in favour of the father of the respondents was an illegal order. In the first place, the decree had already been made absolute years before. In the next place, it follows from what we have already said that the decree having been discharged, it was no longer capable of being made absolute. Mr. Agarwala next contends very strongly that under S. 47, Civil P. C., we should treat the application made for an order absolute, as a suit. This seems open to numerous objections. In the first place, we have not the application before us at all.

We are not dealing with an appeal connected with an application for execution. We are dealing with a suit brought by a party who seeks a declaration that this property cannot be brought to sale. This consideration alone disposes of the argument. It is next contended that the Court below in effect treated the application as an application for execution, and the property could be sold in execution of the

decree. To a great extent this argument has been already dealt with by what we have said above; but it would appear from the decision of their Lordships of the Privy Council in *Gopi Narain Khanna v. Bansidhar* (1) that the plaintiffs' rights, if any, must be asserted by a separate suit. We allow the appeal, set aside the decree of the Court below and grant the plaintiff a decree declaring that the property is not liable to sale under the order absolute obtained by the respondents in respect of the property mentioned in the plaint. The appellants will have their costs in both Courts.

V.B./R.K.

Appeal allowed.

(1) [1905] 27 All. 225=32 I. A. 123=8 Sar. 799 (P. C.).

A. I. R. 1919 Allahabad 295

RAFIQUE AND WALSH, JJ.

G. S. Bhargava and Co.—Defendants—Petitioners.

v.

Jagan Nath-Bhagwan Dass—Plaintiffs—Respondents.

Civil Revn. No. 34 of 1919, Decided on 26th April 1919, from order of Sub-Judge, Agra, D/- 6th February 1919.

(a) Civil P. C. (1908), Ss. 20 and 21—**Defendants carrying on business at Delhi—Their broker agreeing to sell goods to plaintiffs at Agra at lower price—Agreement ratified by defendants at Delhi—Contract having been made at Delhi, Agra Court had no jurisdiction to entertain suit for damages by plaintiffs.**

Defendants, who were carrying on business at Delhi, authorized their broker to sell certain goods at a certain price. The broker agreed to sell the goods to the plaintiffs at Agra at a lower price. This agreement was subsequently ratified by the defendants at Delhi. Plaintiffs brought a suit against the defendants for damages for breach of the contract in the Agra Court:

Held: that the contract having been made at Delhi, the Agra Court had no jurisdiction to entertain the suit. [P 297 C 2]

(b) Civil P. C. (1908), Ss. 20 and 21—**High Court can interfere with order passed on investigating objection as to place of suing.**

Where an objection to the place of suing is investigated and a formal order is passed by the Court in respect thereof, the High Court has jurisdiction to interfere with the order in revision. [P 296 C 1]

(c) Civil P. C. (1908), S. 115—**Examination of evidence by Court of Revision is for seeing whether jurisdiction is assumed.**

When a Court of Revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess. [P 296 C 1]

L. M. Banerji—for Appellants.

Narain Pershad Asthana—for Respondents.

Judgment.—We have come to the conclusion that this application must be granted. The circumstances of the case are exceptional and the form in which the matter comes before us is also exceptional. We do not propose to lay down any general proposition as to what ought or ought not to guide this Court in interfering in revision with what may be called preliminary, interlocutory or subsidiary orders made by the Courts below. In this particular case a substantial dispute has arisen with regard to a contract made between two business men carrying on business respectively at Agra and Delhi. The purchasers under the contract, having reason, as they allege, to complain of the performance of the contract, sued the vendors for damages in the Subordinate Judge's Court at Agra. The defendants were the vendors carrying on business at Delhi and at the earliest possible opportunity they took the objection that, inasmuch as the contract was made at Delhi and was by its terms to be performed outside the Agra jurisdiction, the Court at Agra had no jurisdiction to entertain the suit at all. Thereupon without objection by either party, the Subordinate Judge entertained that objection as a matter wholly independent of the merits of the suit which he had to determine, if it turned out that it was within his jurisdiction to determine, and evidence was called on both sides and considerable argument took place on either side and eventually an elaborate judgment was written upon the sole but important question, "is the suit cognizable by this Court?" The learned Judge himself says it was thought proper to decide the question of jurisdiction first. He decided that question in favour of the plaintiffs on the ground that the contract was made in Agra. An order was drawn up on 2nd February 1919 in the following terms:

"This case coming on for disposal on 6th February 1918, it is ordered that the case is cognizable by this Court."

It is not contended that there is an appeal from that order. We have come to the conclusion that it is impossible to say that such an objection, dealt with in the way this objection was dealt with by what really amounted to a trial by a very careful and thorough judgment ending in the formal order of the Court, is not a case decided in which no appeal lies

within the meaning of S. 115, Civil P. C. We think sufficient justification for taking that view is to be found in the recent decision of the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar* (1).

We do not desire to differ in any way from the general rule which has been laid down that an application of this kind in revision ought not to be treated as an appeal; that findings of fact bearing upon an issue properly before a Court cannot be and ought not to be reviewed by the Court exercising revisional jurisdiction; but without discussing the cases upon the point, we think the trend of authority in the various High Courts in India is to this effect: It cannot be more clearly stated than in the language of Mookerjee, J., in the case of *Rashmoni Dasi v. Ganada Sundari Dasi* (2) that

"when a Court as a Court of Revision looks into evidence, it does so with a view to determine whether the subordinate Court has assumed a jurisdiction which it did not possess."

The same view has been recently given effect to by a judgment of Ryves, J., as he was then sitting in this Court in June 1918 in a case reported as *Behari Lal v. Baldeo Narain* (3), the reasoning of which we entirely approve and adopt.

We have therefore to consider whether on the evidence before the learned Judge there was really anything which could justify him in holding that he had jurisdiction to entertain this suit on the ground that the contract was made at Agra. We have come to the conclusion that there is nothing. As a matter of fact, with certain important exceptions, we do not differ from his conclusions of fact but the learned Judge unfortunately wholly misdirected himself and confused the negotiations with the bargain, and the terms of the contract with a binding acceptance. The facts as sworn to may be simply stated. One Kanhaiya Lal, who is said to be a broker or agent for the defendants, was endeavouring to obtain a purchaser for this cloth, which is suitable for use as tents, for the defendants at Delhi from persons in Agra. It may here be observed that it has been assumed that he was an agent of the defendants. There is not a scrap of evidence to that effect except the bare statement of the plaintiffs, and that state-

ment is consistent with the broker being, as they often are, agent for both parties. He may have been an agent for the purchasers; he may have been an agent for the vendors; he may have been an agent for both parties. Like most brokers he was extremely anxious about earning his commission, as is made clear by the evidence, but it is not clear from whom he expected to receive it. The best test of a man's employment is the question, who is liable to pay his commission.

It may be assumed for the purpose of this inquiry only that he was the agent of the defendants. He had an interview with one of the members of the defendant firm in Delhi and having represented that there were purchasers of this dusuti at Agra he obtained from them two typewritten forms. This method of making a contract is one very commonly adopted among mercantile people; one document constitutes the offer, and the other constitutes the acceptance, both of them being left blank both as regards the name of the purchaser and the contract rate, neither of which were known at that time. He was told that the defendants were ready to sell at Rs. 1-13-0 or Rs. 1-12-6 per lb. and he went to Agra with these two documents. Eventually he obtained an offer for Rs. 1-12-0 from the present plaintiffs. That offer was signed by Bankey Lal, a member of the plaintiff firm, addressed to the defendants at Delhi and the blank for the price was filled in with Rs. 1-12-0 per lb. At the same time according to the plaintiffs' evidence which we see no reason to discredit upon this point, the plaintiffs' clerk filled in upon the other form intended for acceptance the name of the plaintiffs' firm, as purchasers and the price. It is to be observed that this price was less than the price which the defendants had told Kanhaiya Lal they were prepared to accept and there is not a scrap of evidence, indeed everything in the case including the documents points to the contrary, that the defendants authorized Kanhaiya Lal to complete a binding contract on their behalf on any terms that he was able to negotiate. This conclusion, we understand, the learned Judge came to as a matter of law or inference. What invalidates the finding to our mind is that it is absolutely out of the question that the defendants armed their agent with documents formally signed

(1) A. I. R. 1917 P. C. 71=40 Mad. 793=40 I. C. 650=44 I. A. 261 (P. C.).

(2) A. I. R. 1915 Cal. 49=26 I. C. 275.

(3) [1918] 40 All. 674=48 I. C. 14.

by them as binding contracts with the price left blank, and with *carte blanche* authority to fill them up for any price which he saw fit to arrange.

Such a proceeding is almost incredible on the part of a reasonable business firm. What actually happened is testified to by the direct evidence of Keshab Deo, one of the members of the defendant firm, and is confirmed in every possible way by the documentary evidence. Having arranged this price with the plaintiffs and confident that he would persuade the defendants to accept it, he wired to the defendants at Delhi that he had sold. The learned Judge attaches great importance to this telegram. So do we, but we think it points exactly in the opposite direction to that which the learned Judge thinks it ought to be taken. So far as Kanhaiya Lal was concerned, he had sold in the sense that he had arranged a sale for his principals but he had no authority to complete the contract and if he had, there would have been no necessity for his journey to Delhi. He went to Delhi personally to report what he had done. He was at once rebuked by his principal for having used the word "sold" in the telegram. His explanation was that it was a piece of commercial license to prevent the defendants disposing of the goods anywhere else and he then, and we are satisfied for the first time, at that interview disclosed to the defendants the price at which he had arranged to sell. The defendants not unnaturally pointed out that it was not the price which they had told him they were willing to accept. According to Keshab Deo he made an almost piteous appeal to them in his own interest as well as in the interest of the defendants to close the bargain and the bargain was then accepted. There are to our minds two pieces of internal evidence upon the document itself which the learned Judge has wholly left out of view which conclusively show the truth of this story. The signature of the vendors, the accepting firm, is dated 8th August, the day after the telegram, the day after the blanks had been filled in at Agra, the day of Kanhaiya Lal's interview with his principals at Delhi. The second point is that the writing of the signature of the name of the firm across the stamp accepting the contract is the same as the initials G. S. B. against the price which had been filled in, in the con-

tract. The plaintiffs' clerk made a feeble attempt to claim that these initials had been put there by him but receded from that position on looking at the document.

We are satisfied that the terms were initialled by the same person who signed the document. Under these circumstances the learned Judge, having wholly ignored the importance of the fact that the document was in fact signed and the contract completed by the defendants themselves as principals, has, therefore failed to investigate the question where and under what circumstances that which alone would make the contract a binding contract in law at all took place. He has assumed jurisdiction over a matter which, if he had properly applied himself to the facts, he was bound to hold he had no jurisdiction to try. Revision is a discretionary jurisdiction but in an important matter of this kind, if the law enables us to do it, it is to the best interests of the parties themselves and of the public that if these preliminary questions can be finally determined by an authoritative decision before all the expense, annoyance and waste of time of a prolonged litigation, it is better that it should be done, and we therefore quash the order of 10th February and direct the plaint to be returned for presentation to the proper Court. The applicants must have their costs of this application.

V.B./R.K.

Order quashed.

A. I. R. 1919 Allahabad 297

PIGGOTT AND WALSH, JJ.

Mt. Amina Bibi and another—Appellants.

v.

Rama Shankar Misra—Respondent.

Execution First Appeal No. 83 of 1918, Decided on 25th February 1919, from decision of Sub-Judge, Basti, D/- 19th January 1918.

(a) **Decree—Construction**—No general rule can be laid down.

No general rule can be laid down for construing decrees: each case must depend upon its own decree. [P 298 C 2]

(b) **Civil P. C. (1908), S. 35—Unsuccessful mortgagor appellant even is liable for costs under ordinary rule.**

The ordinary rule that an unsuccessful appellant must personally pay the costs of his appeal admits of no exception in favour of a mortgagor. In the case of an unsuccessful appeal by a mortgagor, the ordinary rule in equity is that the mortgagee is entitled to recover against him all the costs and expenses of maintaining or enforcing the security, provided he acts reasonably and

according to law, and further to add them to his security, that is to say, he is given both remedies, the personal remedy against the debtor and the remedy in specie against his security.

[P 298 C 2; P 299 C 2]

(c) **Mahomedan Law — Guardianship — De facto—Mother de facto guardian of minor sons cannot give valid discharge for payment made to minors—She does not come within Limitation Act (1908), S. 7.**

A Mohamedan mother, who is de-facto guardian of her minor sons, having no authority to transfer or deal with the property of the minors, cannot give a valid discharge for any payment made to the minors, nor does she come within the exception to S. 6, Lim. Act, defined in S. 7 of the Act.

[P 299 C 2]

Abdul Raoof and S. M. Sulaiman—for Appellants.

Jung Bahadur Lal for Gokul Prasad—for Respondent.

Walsh, J.—This is an appeal arising out of an application by certain decree-holders, who are minors and represented by their mother as guardian ad litem, to enforce against a mortgagor personally, or by sale of any property which can be lawfully sold in execution of a personal decree against him, an order for costs passed in an appellate decree of this High Court. A suit for sale was brought at a time when the money payable under the mortgage was statute barred. It resulted in a final decree for sale dated May 1912. One of the mortgagors appealed from that decree. His appeal was dismissed on 28th May 1913 and by the well-known authority of a Full Bench decision that decree became the final decree in the mortgage suit. Some of the mortgagors had transferred their interests and were not made parties to the appeal. This point has been relied upon by Dr. Suleman for the appellants, but in the view we take of the other point in the case it is not necessary to say anything more about it. The final decree in the mortgage suit, as passed by this High Court on appeal, extended the time for payment by the mortgagor for another six months from the date thereof and went on to direct the appellant to pay to the respondents a sum of Rs. 993-10-0 or thereabouts. The question before us is, what is the meaning of that decree; in other words, are the decree-holders entitled to enforce that order for costs as a simple money decree? The main difficulty in the argument before us has been the presence in the law reports of a by no means inconsiderable number of authorities which are somewhat difficult

to reconcile. We do not propose to discuss these in detail. The Court below not unnaturally decided to follow a two-Judge decision of this Court reported as *Damber Singh v. Kalyan Singh* (1), in which case the Judges construed the decree then before them as confining the order for costs to an order making such costs recoverable only against the mortgaged property. We do not take the same view of this decision as the Court below, that is to say, it cannot be treated in the way in which a two Judge decision declaring the interpretation of a particular enactment, or laying down in definite terms some general principle of law, must be treated as a binding authority upon other Courts of equal jurisdiction. It is merely an expression of opinion upon the interpretation of that particular decree. On the other hand, there are reported cases in which Judges of this Court, my brothers Piggott, J., Tudball, J. and Chamier, J., and in an unreported case my brother Rafique, J. have construed other and somewhat similar decrees in the sense in which the appellants ask us to construe the decree now before us. All we can say is that it is impossible to say in every case, where the circumstances are not necessarily the same, that because one Judge has construed a decree in one way, another Judge is bound to construe a similar decree in the same way. The real trouble is that all these decided cases have got into the reports at all. They bind the parties and nobody else.

We think that the true solution cannot be better expressed than it is in the judgment of the learned Chief Justice of the Calcutta High Court reported as *Mohunga Ojha v. Ram Bahadur* (2), in which he pointed out that each case must depend upon its own decree. There is nothing in this decree to indicate any special restriction upon the rights given to the decree holders. The ordinary penalty of an unsuccessful appellant is that he must personally pay the costs of his appeal. There is no reason or principle why an exception should be made in favour of mortgagors. It would be very much against the interests of the mortgagors if it were so because were there such a recognized principle in every appeal brought by a mortgagor, a mortgagee

(1) [1918] 40 All. 109=43 I. C. 557.

(2) [1912] 15 I. C. 23.

it seems to me, would have an irresistible claim for an order of security for costs, otherwise he would be compelled to run the risk of the dilatory and obstructive proceedings of the mortgagor exhausting the value of the security and being left in the cold as regards the costs which the law clearly contemplates he ought to recover. Nor is there any reason why the rights of the mortgagee to recover the costs of the failure of an unsuccessful appeal by a mortgagor should be held to be limited to either one or other of his alternative remedies, either personally or against the mortgaged property.

The ordinary rule in equity is that a mortgagee is entitled to recover against a mortgagor all the costs and expenses of maintaining or enforcing the security provided he acts reasonably and according to law and further to add them to his security, that is to say, he is given both remedies, the personal remedy against the debtor, and the remedy in specie against his security. S. 35, of the Code provides that costs shall be in the discretion of the Court, but that when they do not follow the event the Court shall state its reasons. The event in the case of an unsuccessful appeal by the mortgagor is obvious. By bringing the appeal at all he has impliedly undertaken, and made himself liable personally to pay any expenditure which his failure may throw upon the opponent. And speaking for myself, and I think my brother agrees, it seems to me that the burden is upon an unsuccessful appellant, if he wants to exclude any alternative under which he may be eventually made responsible for the payment of the costs which the law intends in the ordinary course he shall pay, to make an application to the Court dismissing his appeal for that purpose, and to see to it that the decree makes it clear that that head of liability is expressly excluded. And it ought to be clearly understood and cannot be too strongly impressed upon members of the Bar in such cases to see to it that the decree ultimately drawn up in accordance with the recognized principle which I have just enunciated, and the decree writers in the office ought to pay particular attention to this matter. In our opinion the plaintiffs, now known in the High Court's decree as the respondents, should get their costs against the

appellant and the decree renders the appellant personally liable for the same.

On the face of it the application in this case is statute barred. Mr. Jung Bahadur Lal having a decision in his favour in the Court below was entitled to take the objections here. It has not been dealt with at all on the merits in the Court below, and we have had therefore to be careful to see whether we ought not to send the case back for further consideration. The facts are not in dispute. It is admitted that the decree-holders are minors, and the only fact relied upon to take the application out of the saving clause of S. 6, Lim. Act, is the fact that Mt. Amina Bibi is their mother and herself their natural guardian or what the Privy Council calls the de facto guardian and that she is also guardian ad litem of these minors. If it had been up to that time debatable ground in India, it has now by a recent judgment of the Privy Council reported as *Imambandi v. Sheikh Haji Mutsaddi* (3) been made quite clear and binding upon us that a Mahomedan mother, who is de facto guardian in such circumstances as these, has no authority to transfer or deal with the property of the minors and therefore obviously could not give a discharge for any payment made to the minors. Therefore this guardian does not come within the exception to S. 6, which is defined in S. 7. Secondly, it is said that she was guardian ad litem, but O. 32, R. 6, makes it quite clear that she could not give a discharge or settle or compromise on behalf of the minors without the leave of the Court. That in itself shows that she does not correspond to the definition of a person able to give a discharge under S. 7.

Under these circumstances it would be idle to send the case back. It is quite clear that the application was within time and must succeed. I would therefore allow the appeal, set aside the decree of the Court below and dismiss the objection of the judgment-debtor with costs.

Piggott, J.—I agree.

V.B./R.K.

Appeal accepted.

(3) A. I. R. 1918 P. C. 11=47 I. C. 513=45 Cal. 878=45 I. A. 73 (P. C.).

A. I. R. 1919 Allahabad 300 (1)

TUDBALL, J.

Narain Das and another—Applicants.
v.*Emperor—Opposite Party.*

Criminal Revn. No. 518 of 1918, Decided on 2nd September 1918, from an order of Magistrate, First Class, Garhwal.

Penal Code (1860), S. 448—School started by complainant in building erected by public subscription—School closed down on rival school being started—Accused taking possession of school in absence of complainant—Accused held not guilty of offence under S. 448.

Complainant started a school in a building erected by public subscription. On another school being started his pupils all left him and he closed down and went away. In his absence the accused took possession of the building on behalf of the rival school and started to hold certain classes in it.

Held: (1) that the complainant was not the owner of the building nor had it been entrusted to him and that it was impossible to say that the accused intended to insult or annoy him; the accused were therefore not guilty of an offence under S. 448, I. P. C. [P 300 C 1,2]*Satya Chandra Mukerji—for Applicants.**R. Malcomson—for the Crown.***Judgment.**—The applicants have been convicted of criminal trespass under S. 448, I. P. C., and have been sentenced to fines of Rs. 10 and Rs. 20, respectively. The Magistrate has written a long and detailed judgment in which he has set out the facts very clearly. The school building, which is the subject-matter of the dispute, was clearly not the property of the complainant in the case. It was built by public subscription and he started a school in it with the assistance of certain persons whom he subsequently refused to allow to interfere with his management of the school. On another school being started his pupils all left him and he closed down. He went away and in his absence the applicants and certain others took possession of the main building on behalf of the other school, which is also a public institution, and started to hold certain classes in it. The complainant returned and put a lock upon the building which the opposite party at once removed. On these facts the Magistrate has held that the applicants have committed criminal trespass in that they entered upon the property with the intention of annoying the complainant. It is quite clear that there was no such intention in their minds at all. The intention with which they entered upon the property had nothing to do with the annoying of the complainant, and it is also very doubtful whether he was in possession of the building at the time when the entry was made. It was not his building nor had it been entrusted to him. He had closed the school and had gone away, and it is impossible to say that the applicants entered upon the building in order to insult or annoy him. On the facts found the applicants ought to have been acquitted. I allow the application and set aside the convictions and sentences. The fines, if paid, will be refunded.

tered upon the property had nothing to do with the annoying of the complainant, and it is also very doubtful whether he was in possession of the building at the time when the entry was made. It was not his building nor had it been entrusted to him. He had closed the school and had gone away, and it is impossible to say that the applicants entered upon the building in order to insult or annoy him. On the facts found the applicants ought to have been acquitted. I allow the application and set aside the convictions and sentences. The fines, if paid, will be refunded.

V.B./R.K.

*Application allowed.***A. I. R. 1919 Allahabad 300 (2)**

KNOX, J.

Emperor

v.

Ram Charan—Accused.

Criminal Ref. No. 768 of 1918 Decided on 10th December 1918, by Sess. Judge, Cawnpore.

Income-tax Act (1886), Ss. 34 (b) and 46—Notice—Delivery of notice by unregistered post—Conviction for not complying with such notice is consequently illegal.

Delivery of a notice by unregistered post does not amount to the service required by S. 46, Income-tax Act.

Therefore, a conviction under S. 34 (b), Income-Tax Act based on the failure to comply with notice sent by unregistered post is not maintainable. [P 300 C 2]

*R. Malcomson—for the Crown.***Judgment.**—Ram Charan Agarwal was convicted of an offence under S. 34 (b), Income-tax Act and ordered to pay a fine of Rs. 104. He maintains that the notice in question never reached him and that he is therefore not guilty. It appears from the statement made on the case by the learned Sessions Judge of Cawnpore that though the notice was sent through the post office at Cawnpore, it was sent in the ordinary post and was not registered. The learned Sessions Judge maintains that it is necessary, before formal act of service by post can be held to exist, to prove that the letter was sent by registered post. This letter was not sent by registered post and I agree with the learned Sessions Judge that delivery by unregistered post would not amount to the service required by S. 46, Income-tax Act. I set aside the conviction and sentence and direct that the fine, if paid, be refunded.

V.B./R.K.

Conviction set aside.

A. I. R. 1919 Allahabad 301

RICHARDS, C. J. AND RAFIQUE, J.

Ram Bharosa Sahu—Defendant—Appellant.

v.

Mt. Kabutra—Plaintiff—Respondent.

Second Appeal No. 1137 of 1917, Decided on 13th February 1919, from decision of Addl. Judge, Gorakhpur, D/- 27th June 1917.

Limitation Act (1908), Art. 10 — Property mortgaged by conditional sale in 1907—Foreclosure decree by plaintiff in 1913 — Property transferred to defendant in 1914—Suit for pre-emption by plaintiff in 1915 on basis of entry in *wajibularz* — If custom proved was wide enough to include mortgage suit held barred under Art. 10—If custom did not include mortgage no right of pre-emption arose—Pre-emption, Custom.

Certain property was mortgaged by way of conditional sale in 1907. The mortgagee obtained a foreclosure decree in 1912, which was made absolute in June 1913. In April 1914 the property was transferred to the defendant and in June 1915 the plaintiff brought a suit for pre-emption on the basis of an entry in the *wajibularz* :

Held : (1) that if the custom proved was sufficiently wide to include a mortgage, then the plaintiff's cause of action arose when the mortgage was made and limitation having begun to run from the date of the registration of the mortgage, the suit was barred under Art. 10. (2) that if, on the other hand, the custom was not sufficiently wide to include a mortgage, then no right of pre-emption arose by reason of the fact that the mortgagee had obtained a decree absolute upon the mortgage. [P 301 C 2; P 302 C 1]

Sital Prasad Ghose—for Appellant.*Surendra Nath Sen*—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. It appears that the property was mortgaged as far back as the year 1907. The particular form of mortgage adopted was what is called a mortgage by conditional sale. No suit was then instituted to assert any right of pre-emption. A foreclosure decree was obtained in 1912, which was made absolute on 7th June 1913. Again no attempt was made to assert any right of pre-emption. The property was then transferred to the appellant on 1st April 1914 and the present suit was not instituted until the 26th June 1915, that is, more than a year after the transfer in favour of the defendant vendee was registered. If pre-emption was sought by virtue of this last mentioned deed of transfer, it is quite clear that it was barred under Art. 10, Lim. Act as being brought more than one year after the registration of the sale deed. The plaintiff however based her cause of action on the making of the de-

gree absolute in the foreclosure suit, and then by applying Art. 120, Lim. Act, attempted to show that the suit was filed within time. The contending defendant pleaded that there was no custom, that the custom did not apply to transfers by way of mortgage and that the suit was barred by limitation.

We think that the first point to be considered in this case is what was the custom assuming that there was any right of pre-emption at all. The only evidence was that afforded by the entry in the *wajibularz*. This does not on the face of it purport to record any right on the occasion of a mortgage. We must bear in mind that the mortgage of 1907 was made long after the passing of the Transfer of Property Act in one of the recognized modes of mortgaging property. It would seem therefore that if there was no right of pre-emption when the mortgage was made, that right could not accrue at a later stage when the mortgagee took steps to enforce the mortgage unless a custom giving such a right was proved. In the present case there is absolutely no evidence of any such custom. The learned advocate, on behalf of the respondent, has contended that in all cases in which a custom of pre-emption on sale is proved the right of pre-emption can be enforced at any time within six years after a complete transfer has been carried out by means of a suit on the mortgage and sale of the property in pursuance of the mortgage-decree. If this proposition were correct, it would certainly lead to astounding results. A number of cases have been cited as to what is the period of limitation for pre-emption suits. But all these cases proceed on the basis that the right of pre-emption had accrued on a particular date and the question was whether on that assumption Art. 10 or Art. 120 applied.

It is quite clear that if a right of pre-emption accrues on a particular date and if the case cannot be brought within the provisions of Art. 10, then Art. 120 must apply. We do not think that any of these cases are applicable to the present case, once it is decided that the custom proved in the present case was not a custom which entitled the pre-emptor to pre-emption upon the making of the decree absolute. In our opinion if the custom proved were sufficiently wide to include a mortgage, then the plaintiff's cause of

action arose when that mortgage was made and the year of limitation would run from the date of the registration of the mortgage. If on the other hand the custom is not sufficiently wide to include a mortgage, then it seems to us that no right of pre-emption arose by reason of the fact that the mortgagee obtained a decree absolute upon that mortgage. For these reasons we allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 302 (1)**

KNOX, J.

Emperor

v.

Sarju Mallah—Accused.

Criminal Ref. No. 804 of 1918, Decided on 11th December 1918, by Sess. Judge, Benares.

Penal Code (1860), S. 403 — Criminal misappropriation — Constable appropriating strayed sheep is guilty under S. 403.

A sheep intended for sacrifice at the Id escaped and strayed away from its owner and was captured the next day by the accused, who was a constable. The latter instead of sending the animal to the pound kept it. A few days later he was transferred to another Thana. He took the sheep with him to the second Thana and kept it there.

Held: that the accused was guilty of an offence under S. 403. [P 302 C 2]

Judgment.—Sarju Mallah employed in the River Police of Benares has been convicted of an offence under S. 403, I. P. C., and sentenced to one month's rigorous imprisonment. The Sessions Judge of Benares has referred the case to this Court with a recommendation that the conviction and sentence be set aside. He has forwarded along with his recommendation an explanation from the Joint Magistrate of Benares who convicted and sentenced the accused. It appears that a sheep intended for sacrifice at the Id escaped and strayed away from its owner and was captured the next day by the accused. The constable, instead of sending the animal to the pound, kept it. A few days later he was transferred to another Thana. He took the sheep with him to the second Thana and kept it there. The learned Judge appears to think that he did not dishonestly misappropriate the sheep, that no offence has been established against him and recommends that the conviction and sentence

be set aside. I find myself unable to agree with the learned Sessions Judge. A police constable of 17 years' standing can hardly plead ignorance of the law and the very fact of his taking the animal away from the Thana where he originally was to another Thana and still keeping it is, to my mind, evidence of dishonesty. I decline to interfere and order that the record be returned.

V.B./R.K.

*Record returned.***A. I. R. 1919 Allahabad 302 (2)**

RICHARDS, C. J. AND BANERJI, J.

Lalman Pande—Plaintiff—Appellant.

v.

Sheo Narain Pande and others — Defendants—Respondents.

Second Appeal No. 830 of 1916, Decided on 22nd April 1918, from decree of Sub-Judge, Basti.

Contract—Construction — Agreement between mortgagor and mortgagee that latter on redemption of earlier mortgage was to become owner of portion of redeemed property—Agreement acted upon—Suit by mortgagor to redeem original mortgages — Suit held not maintainable — Non-registration of agreement held not to affect validity of redemption by mortgagee.

The manager of the plaintiff's family entered into an agreement with the defendants-mortgagees that the latter should redeem certain earlier mortgages whereupon they would become owners of the redeemed property except a 4-pies share which was to be made over, unencumbered, to the plaintiff's father. The agreement was not registered, but it was acted upon by the parties to it, in that the plaintiff's father obtained a decree for the 4-pies share, and, subsequently, partition proceedings were taken on the basis of defendants being the owners, and not merely mortgagees, of the property. Plaintiff now sued the original mortgagees for redemption.

Held: that the suit was not maintainable, and the fact that the agreement was not registered, as it should have been, did not affect the validity of the redemption by the defendants, the second parties to the agreement. [P 303 C 1]

Harnandan Prasad—for Appellant.

Kailas Nath Katju for Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit for redemption. The property was mortgaged in the year 1880. The property was in a sense redeemed in the year 1898 by the defendants of the first party. In truth and in fact the redemption took place in this way, that the manager of the plaintiff's family entered into an agreement with the defendants of the first party that the latter should redeem two mortgages and that the defendants were to become the proprietors

of all the property redeemed except a 4-pies share which was to be made over unencumbered to the plaintiffs' father, who represented the plaintiffs' family. This document was not registered and accordingly it could not be used to show that the equity of redemption had rested in the answering defendants. It was proved in the Court below, apparently without any objection on legal grounds, that as a matter of fact the agreement, though unregistered, had been acted upon. The 4-pies share had been recovered in a suit brought by the plaintiffs' father in 1902 and partition proceedings had subsequently taken place on the basis that the answering defendants were the actual proprietors, and not merely mortgagees of the share of which they were in possession. Under these circumstances we think that the Court below was justified in dismissing the suit; we think that the principle upon which the case of *Mahomed Musa v. Aghore Kumar Ganguli* (1) was decided, may be applied to this case. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1914 P. C. 27=42 I. A. 1 (P.C.).

A. I. R. 1919 Allahabad 303

PIGGOTT AND WALSH, JJ.

Mohamed Kazim & others—Applt.

v.

Mt. Rukia Begam—Respondent.

Execution First Appeal No. 345 of 1917, Decided on 18th February 1919.

(a) Civil P. C. (1908), O. 21, R. 2, and S. 47—Application of judgment-debtor to enter up full satisfaction of decree—Points for determination stated.

Where a Court has before it an application by a judgment-debtor to enter up full satisfaction of the decree, it must determine, first, whether there has been an adjustment of the decree out of Court by which the decree-holder is bound and, secondly, whether, under the terms of that adjustment, anything remains to be paid to the decree-holder. [P 304, C 1, 2]

(b) Civil P. C. (1908), S. 47, O. 21, R. 2—Executing Court must decide allegation that adjustment outside Court is fraudulent.

An allegation that an adjustment of a decree out of Court is fraudulent must be gone into and decided by the Court of execution. [P 305 C 1]

Nehal Chand—for Appellants.

S. A. Haidar—for Respondent.

Piggott, J.—This is an execution first appeal by certain judgment-debtors. The respondent Rukia Begam was the widow of one Muhammad Husain. The judgment-debtors-appellants are the remaining heirs of this gentleman. The respondent had a claim for dower-debt

against the estate of her late husband and admittedly this claim much exceeded the entire value of the estate. The lady brought a suit, and it is admitted that a sum of Rs. 27,000 was due to her under a decree obtained in the said suit.

The application out of which this appeal arises was one by the judgment-debtors for an order certifying that this decree for Rs. 27,000 had been completely satisfied. Their case is that a sum of Rupees 14,000 had been paid to the decree-holder out of Court and that the decree-holder had herself certified personally before the execution Court the receipt of the aforesaid sum of Rs. 14,000. They stated further that, by an agreement between the parties arrived at about the same time, it was settled that the balance of Rs. 13,000 should be paid off in accordance with the terms of a somewhat complicated compromise. It seems that in this compromise two items of immovable properties were referred to, a house and a zamindari share. The house is valued at about Rs. 5,000, and it is provided that the judgment-debtors shall either pay Rs. 5,000 to the decree-holder or make a conveyance in her favour of the house itself. With regard to the zamindari share it is provided that there is to be a valuation of the same by certain chosen arbitrators and that the judgment-debtors shall have the option of either conveying the property itself to the decree-holder or paying to her the amount of the valuation. The case for the judgment-debtors is that the zamindari share has been valued at Rs. 2,068 and that they have paid this amount into Court for the credit of the decree-holder. The decree-holder's case is that the compromise was obtained from her by fraud. With regard to the sum of Rs. 14,000 she says she never received payment of the same, but was induced to go into Court and falsely stated that she had done so by the false representation conveyed to her on behalf of the judgment-debtors that, if she did not do this, one or more of them was likely to be sent to prison by order of the execution Court. She further said that, even when she made this statement by which she understood herself to be abandoning her claim to Rs. 14,000 out of what was due to her under the decree, she believed that the rest of the arrangement come to was that the judgment-debtors would pay her Rs. 13,000 in cash

within a short interval of time. She says she never knew or understood that, as an alternative to the payment of Rupees 13,000 in cash, the judgment-debtors were to be allowed the option of conveying to her immovable property which she did not want and would not know what to do with if she got it. She says further that she knew nothing whatever about any arrangement for the valuation of the zamindari share, that she did not agree to its valuation by any chosen arbitrators and that she never agreed to accept whatever sum these arbitrators might choose to fix as the value of this property as equivalent to the sum of Rs. 8,000 which, even on the judgment-debtors' own showing, would remain due to her under the decree. Incidentally she also says that the zamindari property has been greatly undervalued at Rs. 2,068.

The Court below has dealt with the case in a somewhat peculiar manner. To begin with, it had before it simply an application by the judgment-debtors to certify full satisfaction of the decree. It has gone a good deal beyond merely rejecting this application. It has come to a finding that the decree-holder is bound, so far as the execution Court is concerned, by her admission that she had received Rs. 14,000 out of Court, although at the same time it expressed grave doubts whether any such payment had in fact been made. With regard to the rest of the compromise it holds that the decree-holder is in no way bound by it, that she never really assented to its terms and more particularly that she is not bound by the valuation put upon the zamindari property. At the same time the finding actually arrived at as to the sum due under the decree is based on a certain alternative provision in the terms of the compromise itself. It was therein stated that, if the judgment-debtors failed to pay the balance of Rs. 13,000 in one or other of the ways provided under the terms of the compromise, then the decree-holder would be entitled to take out execution for a sum, not of Rs. 13,000 but of Rs. 15,000, less any amount which might actually have been paid into Court.

It seems to me that this is not a satisfactory way of dealing with the matter. The Court had before it the application of the judgment-debtors to enter up full satisfaction of the decree. In order to dispose of that application it had to

determine, firstly, whether there had been an adjustment of the decree out of Court by which the decree-holder was bound and, secondly, whether under the terms of that adjustment anything remained to be paid to the decree-holder. The learned Subordinate Judge has given very good reasons for holding that Mt. Rukia Begam has not entered into any compromise or adjustment of this decree binding upon her. A number of facts are apparent on the record which show that the compromise could not have been honestly brought about. Even supposing that a sum of Rs. 14,000 had been paid out of Court, or that Rukia Begam had made up her mind to relinquish her rights under the decree to this extent, there still remained a sum of Rs. 13,000 due to her. This the judgment-debtors claim to have paid off by a payment of Rs. 2,068 and by the conveyance of a certain house. As regards the house, they do not hold a clear title to the same. The share of one of the judgment-debtors has been conveyed by him to his wife and another share has been mortgaged and sold in execution of a mortgage claim. Evidence was offered on the part of the judgment-debtors to the effect that these transactions had not really effected any transfer of their rights in the house and that the vendee of one judgment-debtor and the purchaser at auction of the share of another were ready to relinquish their claims. It is however sufficiently obvious that the respondent has not got anything like a reasonably clear title by the conveyance which the appellants have executed in her favour. The valuation of the zamindari share at Rs. 2,068 is either a gross undervaluation, or it is not.

If it is, there has been fraud in one way; and if it is not, there has been fraud in another way, for it is obvious that the decree holder could not have consented to accept landed property worth Rs. 2,068 in satisfaction of the balance of a claim amounting to Rs. 8,000. It is idle to suggest that the decree-holder may have desired to deal leniently with her husband's heirs and to relinquish some part of what was due to her. In the absence of evidence that Rupees 14,000 had actually been paid, her acknowledgment in Court of the receipt of this sum would in itself be a relinquishment of more than half of her claim, and there

is every reason to believe the statement which she made in the course of this enquiry that, as regards the balance of Rs. 13,000, she not only had no intention of relinquishing it, but believed the assurance which had been given her that this much at any rate would be paid to her, cash down, within a reasonable interval of time. From any point of view it is clear that the Court below was right in holding that the decree had not been fully satisfied and in rejecting the application of the judgment-debtors to enter satisfaction in full. On the other hand I think that the order of the Court below purporting to fix a definite sum of Rupees 12,932 as remaining due to the decree-holder under the decree went beyond what was necessary for the disposal of the matter then before the Court, and should be set aside as not binding on the parties in any future execution proceedings which the decree-holder may be advised to take out. The question whether the decree-holder is entitled to claim execution of the decree to the extent of Rs. 27,000 or only to the extent of Rs. 13,000, is one which can most conveniently be considered on an application for execution. At any rate, this much seems clear that, if the decree-holder is not bound by the terms of the compromise, there is no adequate reason for giving effect to one of its terms as the Court below has done. As regards the question of the payment of Rs. 14,000 certified in Court the Court below has assumed that to this extent the decree-holder is bound by her own act. The question whether the certificate of payment thus obtained from the decree-holder was or was not part of a compromise fraudulently obtained by the judgment-debtors is one which ought to be considered when it comes before the Court upon a proper application for execution.

There is good authority in this Court as well as elsewhere for the proposition that as between the decree-holder and judgment-debtor the question of an alleged fraudulent adjustment of the decree must be gone into and decided by the execution Court. vide *Adhar Singh v. Sheo Prosad* (1). Even if there were any technical difficulty about the investigation on the merits of the objections raised by the decree-holder regarding this alleged pay-

ment of Rs. 14,000, the Court would have to consider the provisions of S. 47, Cl. (2), Civil P. C., and might in any event come to the conclusion that the entire question of this alleged adjustment of the decree required to be determined in one single proceeding. As the evidence at present stands, the decree-holder has asserted that she was induced to make a false statement about this sum of Rs. 14,000 by false representations made to her upon a matter of fact and by promises which were not fulfilled. These allegations rest at present upon her own statement and in the view which the Court below took of the question of law it is by no means clear that the judgment-debtors were allowed any adequate opportunity of producing evidence either as to the actual payment out of Court of Rs. 14,000 or as to the circumstances under which a formal admission of payment was obtained from the decree-holder. Nothing in the decision pronounced in this case should be regarded as affecting the rights of the parties on the merits in any inquiry which may arise in future upon a further application for execution by the present respondent. I am of opinion therefore that the proper orders for us to pass are firstly, that we dismiss this appeal with costs including fees on the higher scale; secondly that we allow the cross objection to this extent: that we set aside so much of the order of the Court below as purports to determine between the decree-holder and the judgment-debtors the fact that a sum of Rs. 12,932, neither less nor more, remains capable of realization under the decree. This decision should be held to determine only this point that the decree has not been satisfied in full as alleged by the judgment-debtors and that the decree-holder is not bound to accept payment of Rs. 13,000 by conveyance of the house or of the zamindari property referred to in the alleged compromise.

Walsh, J.—I agree. If it were not for one passage in the learned Judge's judgment I should be content merely to agree but as between these parties who will inevitably have to fight out this question at some time or another the learned Judge has gone out of his way to express an opinion not merely of fact but also of procedure which he himself on any future occasion would otherwise necessarily be disposed to follow, or a succes-

(1) [1902] 24 All. 209.

sor of his might adopt. I think the expression of opinion is so serious and might lead the decree-holder into such serious consequences that the parties have the right to an expression of the appellate Court's view on that particular matter. The learned Judge was of opinion that if he had to decide the matter he would feel himself compelled to hold that the woman was duped and that no sum of Rs. 14,000 had ever been paid as mentioned in the compromise. Having expressed this opinion he went on to say that he could not decide those points. Up to a point we agree with him. The application before him was one by the judgment-debtor. The decree-holder was not asking for execution so as specifically to raise the question of this alleged part payment of Rs. 14,000. But the learned Judge went on to say in the clearest possible terms that being an execution Court he could not in any case go behind this alleged payment and that the decree-holder was bound by it until she brought a suit to get it set aside in a competent Court.

With this view I find myself unable to agree. In fact I take the view that I am bound by law to disagree with him, whatever my own personal view might be. No doubt there are reported cases where in special circumstances one High Court or another has recognized in spite of S. 47 (as it now is), the right of a party to bring a suit based upon fraud or misrepresentation in a matter which certainly directly relates to the execution discharge or satisfaction of the decree. But to my mind the questions such as those discussed in the judgment now under appeal before us cannot be said to be otherwise than questions arising between the parties to the suit relating to the discharge of the decree. Moreover, it seems to me that there is a clear current of authority dating from many years ago and proceeding up to the highest tribunal that that is the correct view. It was first taken in *Paranjpe v. Kanade* (2) in 1882, a case almost on all fours with this case if the decree-holder in this case had applied for execution in spite of the alleged payment of Rs. 14,000, and the Bombay High Court held that a suit in such a matter was barred.

The question next arose in connexion with a sale in *Sakharam Govind Kale v.*

Damodar Akharam Gujar (3) in 1885, and it was held there on the authority of *Paranjpe v. Kanade* (2) that a separate suit would not lie. The Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (4) in 1892, in a case of a sale in satisfaction of a decree which was alleged to be fraudulent, adopted the view which had up to that date always been taken by the Courts in India, based their decision upon the latter of the two Bombay cases which I have cited and expressed their satisfaction that the Courts in India had not placed a narrow construction on the language of the section when a question had arisen as to the discharge or satisfaction of a decree between the parties. The principle laid down in that case in a question of sale has been invariably and consistently followed by the other High Courts in India and was expressly followed by a decision binding upon me in the authority to which my brother has already referred *Adhar Singh v. Sheo Prasad* (1), so that when the question arises in the case of a sale the matter is beyond controversy. I can see no possible distinction in principle between a question as to the honesty of a sale in satisfaction of a decree, and a question as to the honesty of a compromise in discharge of a decree so far as the applicability of S. 47 is concerned.

By the Court.—We dismiss this appeal with costs, including fees on the higher scale, and we allow the cross-objection to this extent; that we set aside so much of the order of the Court below as purports to determine between the decree-holder and the judgment-debtors the fact that a sum of Rs. 12,932, neither less nor more remains capable of realization under the decree. This decision should be held to determine only this point: that the decree has not been satisfied in full as alleged by the judgment-debtors and that the decree-holder is not bound to accept payment of Rs. 13,000 by conveyance of the house or of the zamindari property referred to in the alleged compromise.

V.B./R.K. Appeal dismissed.

(3) [1885] 9 Bom. 468.

(4) [1892] 19 Cal. 688=19 I. A. 166=6 Sar. 209 (P.C.).

(2) [1881] 6 Bom. 148.

A. I. R. 1919 Allahabad 307 (1)

LINDSAY, J.

Abdullah—Applicant.*Emperor*—Opposite Party.

Criminal Revn. No. 805 of 1918, Decided on 11th January 1919, from order of Sess. Judge, Allahabad.

Penal Code (1860), S. 153 — Mahomedan killing cow—No evidence of malice or wantonness—Conviction is bad.

No conviction under S. 153, I. P. C., can be had unless it is proved, *inter alia*, that the act of the accused was done either malignantly or wantonly.The accused, a Mahomedan, killed a cow in a village sometime before sunrise. The act was observed by one or two Mahomedans, who sent a *chaukidar* to the police station to make a report. The police took cognizance of the matter and the accused was convicted of an offence under S. 153, I. P. C.*Held*: that there being no evidence of malice or wantonness on the part of the accused the conviction was bad in law. [P 307 C 2]*Zahur Ahmad*—for Applicant.*R. Malcomson*—for the Crown.

Judgment.—The applicant, *Abdullah*, has been convicted in the Court of a Magistrate of an offence under S. 153, I. P. C., and sentenced to six months' rigorous imprisonment. The conviction and sentence have been upheld in appeal by the Sessions Judge. The facts alleged against the accused are that on 18th August last he killed a cow in a village some little distance from Allahabad, some time before sunrise. The act was observed apparently by one or two Mahomedans who live in the village. They sent a *chaukidar* who made a report at the police station in the Allahabad city. The report was to the effect that the accused killed this cow and there was some apprehension that the village would get a bad name owing to this act of the accused, which would be taken as an offence by the Hindus. The police took cognizance of the complaint and the accused was sent up for trial under S. 298, I. P. C. The Court however found that no offence under this particular section was proved. It came to the conclusion that there was an offence under S. 153. The fact of the killing of the cow was admitted by the accused. His story was that he was driving it along in order to take it to a slaughter house that on the way it fell and broke its leg and he was therefore obliged to put it to death. Both the Courts below have discussed the various facts which are invol-

ved, but so far as I can see no attention has been paid to the particular words "malignantly" or "wantonly" which are given in the definition of the offence under S. 153. Clearly no conviction under this section can be had unless it is proved *inter alia* that the act of the accused was done either malignantly or wantonly. I have not been referred to any evidence on the record from which an inference imputing malice or wantonness to the accused could properly be drawn. I may also remark that I find it difficult to understand the reasoning of the Court below on the question of what amounts to the giving of provocation. It is an admitted fact that this killing of the cow was not done in the presence of any Hindu whose religious feelings would be wounded. One or two Hindus were called as witnesses in the case. All that their evidence amounts to is that on hearing some time afterwards that this act had been done their religious feelings were wounded. I am not prepared to take the same view of the law as was adopted by the learned Sessions Judge. It is not necessary for me to discuss the matter any further. It is sufficient for the purpose of disposing of this application to say that there being no evidence of malice or wantonness on the part of the accused the conviction is bad in law. I allow the application, set aside the conviction and sentence and direct that the accused be acquitted and released. The bail bond will be discharged.

V.B./R.K. Application allowed.

A. I. R. 1919 Allahabad 307 (2)

RICHARDS, C. J. AND BANERJI, J.

Fazal Rasul—Appellant.

v.

Collector of Agra—Respondent.

First Appeal from Order No. 93 of 1917, Decided on 23rd January 1919.

Land Acquisition Act (1894), S. 45—Notice should be served on person named—Temporary absence does not fall within expression "cannot be found".

A notice under S. 45 should, wherever practicable, be served on the person named in the notice by delivering or tendering: it is only when the person cannot be found that service may be made in another way.

The mere temporary absence from his house of the person to be served would not fall within the expression "cannot be found" used in Cl. (3) of the section. [P 308 C 1]

N. C. Vaish and *Narain Prasad Asthana*—for Appellant.*A. E. Ryves*—for Respondent.

Judgment.—This appeal arises out of an application made in a land acquisition case. It appears that there was no appearance on behalf of the present appellant, who was an objector in the land acquisition reference, and the case was accordingly dismissed for default. An application was made for restoration of the case. The learned District Judge refused to restore the case on the ground that the general attorney of the applicant had been served with the notice. The general attorney swore an affidavit to say that he was also the servant of another man and that after he got the notice he was busily engaged in collecting rents for the payment of Government revenue. It also appears that the appellant was absent from his home at the time the notice was served. The notice was a notice required to be served having regard to the provisions of the Land Acquisition Act. S. 45 provides that all notices under the Act should be served by delivering or tendering; wherever practicable such service should be made on the person named in the notice. Sub-Cl. (3) states that when such person cannot be found, the service may be made in another way. It seems to us that if Fazal Rasul was temporarily absent from his house, it cannot be said that he "could not be found" within the meaning of that expression in Cl. (3). It therefore appears that the service was not technically correct. In addition to this it would seem that there was a reasonable cause for his absence. Under all the circumstances we think that the case should be restored. We accordingly allow the appeal, set aside the order of the Court below and remand the case with directions to re-admit the reference in its original number in the file and proceed to hear and determine the same according to law. We make no order as to costs. Mr. Ryves says he has no instructions to oppose the appeal.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 308**

KNOX, J.

Gopal Das and another—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 722 of 1918, Decided on 28th November 1918, from an order of Dist. Magistrate, Muttra.

Criminal P. C. (1898), S. 423—Case heard and decided by Bench of Magistrates—Judgment signed by one Magistrate—Appeal—Judgment sent back to be signed by other Magistrate—Procedure is not opposed to S. 423.

In a case heard and decided by a Bench of two Magistrates the judgment was signed by only one of them. On appeal the District Magistrate sent the judgment back to be signed by the other Magistrate:

Held: that the procedure adopted by the District Magistrate was in no way opposed to the provisions of S. 423, and that the order made by him was a mere incidental order which he considered just and proper. [P 308 C 2]

Iqbal Ahmad—for Applicants.

Judgment.—The District Magistrate of Muttra, having before him an appeal from the judgment of an Honorary Magistrate of Second Class of Bindraban, found that the case was one which had been tried by a Bench of Magistrates. The chief argument advanced before him was that the judgment was signed and delivered by a single member of the Bench and that this was illegal. He then adopted what seems to me to be a very suitable and sensible order and in no way opposed to S. 423, Criminal P. C. He did not reverse the finding and sentence, he did not alter the finding maintaining the sentence, he did not reduce the sentence, he did not alter the nature of the sentence. He found that on a previous occasion (and as I find on going through the record that on two previous occasions) Lala Phool Chand, whose judgment was before him, had, when he found that he could not proceed alone, refused to proceed with the case at all. The proper inference from this is that if he had been alone on 27th June 1918 he would have, as on two previous occasions, adjourned the case and refused to go on further with it alone. There is nothing to show that on 27th June 1918 Lala Phool Chand was sitting alone on the Bench. The presumption is that there was another Magistrate sitting with him and that (as often happens in this Court) Lala Phool Chand delivered the judgment and signed it. The more proper course would have been for him to hand the judgment over to his colleague and to have got the colleague to sign it. To prevent any difficulty on this score the appellate Court made an incidental order which it considered just and proper. It sent the case back that the judgment might be signed by the colleague. I can see nothing wrong in this order.

there was no colleague present or if that colleague dissented from the judgment, he will refuse to sign it or Lala Phool Chand would return the proceeding saying that there was no colleague with him at the time when he delivered the judgment. It will be time then for the appellate Court to consider what will be the proper order to be passed in the case. Let the proceedings be returned to the appellate Court.

V.B./R.K. *Proceedings returned.*

A. I. R. 1919 Allahabad 309 (1)

STUART, J.

Raghubir Kurmi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 295 of 1919, Decided on 3rd May 1919, against order of Sess. Judge, Azamgarh, D/- 17th February 1919.

Penal Code (1860), Ss. 406 and 420 — Proof of deception is necessary — Person without deception, obtaining property for one purpose and using it for another is guilty under S. 406.

To justify a conviction under S. 420 deception must be proved. Where in the absence of deception a person obtains property for one purpose and uses it for another, he is guilty of an offence under S. 406, and not under S. 420 of the Code.

[P 309 C 1]

L. M. Banerji—for the Crown.

Judgment.—It is clearly proved that the appellant induced the complainant to entrust him with a gold mohur. The complainant's little boy was weeping and the appellant told him (the complainant Jhagroo) to hand him over a gold mohur which was tied round Jhagroo's neck, so that he might induce the boy to stop weeping by distracting his attention with it. Jhagroo gave the appellant the gold mohur and the appellant misappropriated it. The offence is clear, but it is not an offence under S. 420, I. P. C; it is one under S. 406. There was no deception in the matter. The appellant asked for the gold mohur in order that he might play with the child, using the mohur as a plaything. There is nothing to show that he intended to deceive the complainant thereby. He got hold of the gold mohur for one purpose and used it for another.

I alter the conviction from one under S. 420 to one under S. 406. In view of the fact that the appellant had been convicted six times, I uphold the sentence. The revised conviction will be under

S. 406/75, I. P. C. "The sentence will stand at seven years" rigorous imprisonment.

V.B./R.K.

Conviction altered.

A. I. R. 1919 Allahabad 309 (2)

RICHARDS, C. J. AND RAFIQUE, J.

Fazal Ahmad—Plaintiff—Appellant.

v.

Tasadduq Husain—Defendant—Respondent.

Second Appeal No. 1179, of 1917 Decided on 18th February 1919, from decision of Sub-Judge, Bareilly, D/- 8th May 1917.

(a) Mahomedan Law—Pre-emption—Pre-emptor can delay making second demand to enable him to make it in presence of vendee.

The second demand required to be made by the Mahomedan law of pre-emption can be made in the presence of the vendee, in the presence of the vendor, or on the land itself. The person most concerned with the making of the demand, however, is the vendee, and a pre-emptor is entitled to delay the making of the second demand for any reasonable time that might be necessary to enable him to make it in the presence of the vendee.

[P 310 C 1]

(b) Mahomedan Law—Pre-emption—Law applies to Zamindari property.

The Mahomedan law of pre-emption applies to Zamindari property and is not restricted to houses, gardens and small plots of land.

[P 310 C 1]

K. N. Katju, S. M. Sulaiman and Raza Ali—for Appellant.

Iqbal Ahmad—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption brought under the Mahomedan law. The first Court held that the plaintiff had duly performed the requirements of Mahomedan law and granted the plaintiff a decree. The lower appellate Court agreed with the finding of the first Court that the formalities of Mahomedan law had been complied with, but dismissed the plaintiff's suit upon a finding that the plaintiff had ceased to be a cosharer at the time of the institution of the suit. The plaintiff comes here in second appeal. The finding of both the Courts below that the plaintiff performed the formalities of Mahomedan law is binding upon us in second appeal. It is said however that because the plaintiff made the second demand some days after making the first demand and it appearing that the vendor being a near relation of his, he could probably have made the second demand earlier by making it in her presence instead of in the presence of the vendee, and that therefore the plaintiff has not complied with Mahomedan law. The second demand can be

made in the presence of the vendee, in the presence of the vendor, or on the land. It seems to us that the person most concerned with the making of the second demand is the vendee, and that accordingly the plaintiff was entitled to delay for any reasonable time that might be necessary to enable him to make the demand in the presence of the vendee. We therefore think that there is no force in this contention. There were other reasons also which might have explained why the second demand was not made earlier. Another point was lightly touched on, namely that the Mahomedan law of pre-emption does not apply to Zamindari property, but is restricted to houses, gardens and small plots of lands. It may well be doubted whether the Mahomedan law ever did extend to estates, but it would seem that the law rightly or wrongly has been extended. The matter was mooted in the case of *Munna Lal v. Hajira Jan* (1). A Bench of this Court held that the Mahomedan law did apply to Zamindari property.

We now come to the main issue in the case, namely whether or not the plaintiff lost his right to pre-empt by reason of the fact that he had ceased to be a co-sharer at the date of the institution of the suit. It appears that about four days after the institution of the suit and a considerable time after the sale of the property which it is sought to pre-empt, the plaintiff made what is in form at least a usufructuary mortgage of his share in the village to a third party. The amount secured by the mortgage was Rs. 12,000 and the mortgage was, as we have said usufructuary in form, the period being six years. It was alleged by the defendant vendee that this was in reality a sale. The Court of first instance dealing with this matter says:

"On 21st February 1917, this plaintiff has admittedly executed a usufructuary mortgage of his share in this village for Rs. 12,000. But it is not denied that the plaintiff is still a recorded co-sharer and has apparently the right to redeem. He should still be regarded a co-sharer. No other direct evidence has been given under this issue save the production of a copy of the mortgage-deed which has been admitted. Two arguments are however advanced. First, that this claim is really for the benefit of the mortgagee, that the plaintiff means to make a profit out of the suit and in case of success, to sell this share also to the same mortgagee. No pleadings or evidence support this plea—rather if the dates are looked to these will negative any such plea."

(1) [1911] 33 All. 28=7 L. C. 494.

The learned Subordinate Judge goes on to say:

"The only other circumstance which may possibly throw some suspicion is plaintiff's admission that the Rs. 12,000 is very nearly the full value of the property mortgaged."

The Subordinate Judge then finds the issue in favour of the plaintiff and against the vendee. The learned District Judge, after finding in favour of the plaintiff on the issue of the performance of the formalities of Mahomedan law says:

"On the remaining point however I think the appellant must succeed. The plaintiff, after making his first demand on 11th September, and his second on 15th September, did not file his suit till 17th February and afterwards he executed a mortgage for Rs. 12,000.

He goes on to say:

"The presumption, I think, must be, in the absence of any explanation, that this so-called mortgage was really a sale and the plaintiff was really trading away not only his Zamindari share in the village in suit but also his right to pre-emption."

A perusal of the judgment of the learned District Judge shows clearly that he throws the onus on to the plaintiff of showing that what on the face of it was a mortgage transaction was what it purported to be. It seems to us quite clear that the onus of showing that the transaction was an out-and-out sale, lay on the defendant and not on the plaintiff. Even on the assumption that the money secured by the mortgage was equivalent to the value of the property, the plaintiff might still have wished to retain his right to redeem, if he thought fit, after the expiration of six years. The plaintiff remained the recorded proprietor of the share sold, and there was in short no evidence to support the finding that the transaction was a sale. To draw the inference that it was a sale and not a mortgage, from the one fact that the consideration was equivalent or almost equivalent to the value of the property, was an inference which could not legitimately be drawn from that circumstance. We must allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance, with this modification that the consideration money must be paid within two months from this date. If the consideration is paid within the time aforesaid, the plaintiff's suit will be decreed with costs in all Courts. If it is not paid within the time allowed, the suit will stand dismissed with costs in all Courts.

Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

*** A. I. R. 1919 Allahabad 311 (1)**

PIGGOTT AND WALSH, JJ.

Ganesh Dutt Tewari—Applicant.

v.

Jittan Tamboli—Opposite Party.

First Appeal No. 84 of 1918, Decided on 16th December 1918, from an order of Dist. Judge, Benares.

* Criminal P. C. (1898), S. 195 (6) and 7 (a) —Sanction to prosecute—Application to Subordinate Judge dismissed—Further application to District Judge is competent, latter Court being Court to which Court of Subordinate Judge is subordinate.

An application for sanction to prosecute, in respect of an offence arising out of a case decided by a Subordinate Judge on appeal from a Munsif and in which a second appeal was pending in the High Court, was made to the Subordinate Judge who dismissed it. A further application was made to the District Judge who held that he had no jurisdiction to entertain it, and that the application should be made to the High Court.

Held: that the Court of the District Judge being the Court to which the Court of the Subordinate Judge was subordinate, the application had been rightly made to him. [P 311 C 1, 2]

Peary Lal Banerji—for Appellant.

Iqbal Ahmad—for Opposite Party.

Judgment.—This is a first appeal from an order passed by the Subordinate Judge of Benares refusing to sanction the prosecution of one Jittan Tamboli for the offence of forgery, or some cognate offence, committed in connexion with a suit which was tried by the Munsif of Benares. An appeal against the decision of the Munsif in the said suit came before the Subordinate Judge of Benares for decision. The Subordinate Judge disposed of the appeal and a second appeal against his decree is now pending in this Court. In the meantime the present appellant went to the Subordinate Judge with an application for sanction to prosecute under S. 195, Criminal P. C. The Subordinate Judge rejected that application. A further application to grant the sanction which the Subordinate Judge had refused, whether such application be described as an appeal from the order refusing sanction or as a fresh application, undoubtedly lay under S. 195, Cl. (6), Criminal P. C., to any authority to which the Court of the Subordinate Judge was subordinate, as that expression is defined in sub-Cl. (7), S. 195, Criminal P. C.

The present appellant assumed that the proper Court to apply to was the Court of the District Judge, but the learned District Judge has refused to interfere, holding that application ought to be made to this Court, in view of the fact that a second appeal against the decision of the Subordinate Judge lay to this Court and is actually pending. On the wording of S. 195, Cl. 7 (a), Criminal P. C., it would seem that the application (or appeal) was rightly made to the Court of the District Judge of Benares and that the learned District Judge was wrong in not entertaining that application and disposing of it on its merits. As the matter now stands however we think that there are sufficient reasons why sanction should not be granted to the present appellant so long as the second appeal referred to is pending in this Court. When that appeal has been disposed of, it would be open to the present appellant to make a fresh application for sanction, either directly to this Court, or to the Court of the District Judge of Benares, if he finds sufficient reason for doing so. For the present we are of opinion that it would not be in the interests of justice to arm this appellant with a sanction to prosecute, so long as the second appeal in the original suit remains pending. We dismiss this application, or appeal, on this ground alone, and we make no order as to the costs of the same.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 311 (2)

KNOX, J.

Brahma Nath—Applicant.

v.

Sundar Nath—Opposite Party.

Criminal Revn. No. 844 of 1918, Decided on 4th February 1919.

(a) Criminal P. C. (1898), Ss. 145 and 439 —Civil Court deciding question of title to property subject of proceedings under Ch. 12 and directing possession to be given to particular person — Fresh proceedings under S. 145 in respect of same property are without jurisdiction and can be quashed in revision.

Where a civil Court has decided the question of title to property which forms the subject of proceedings under Ch. 12, Criminal P. C., and has directed that possession thereof be given to a particular person, the criminal Court has no jurisdiction to initiate fresh proceedings under S. 145 in respect of the same property. Such a proceeding is without jurisdiction and is liable to be quashed in revision by the High Court.

[P 314 C 1]

(b) **Criminal P. C. (1898), Ss. 145 and 439**—Proceedings under S. 145 must be in intention and form and in fact proceedings under Ch. 12.

Proceedings under S. 145, must be in intention, in form and in fact proceedings under Ch. 12 of the Code by a Magistrate duly empowered to act under that chapter. Where an order under S. 145 was passed by a Magistrate whose jurisdiction was open to doubt and as a result of proceedings which were not in intention, form or fact proceedings under Ch. 12 of the Code.

Held: that the proceedings were illegal and were liable to be set aside in revision.

[P 313 C 2]

Peary Lal Banerji and Shiva Prasad Singha—for Applicant.

N. C. Vaish, S. M. Sulaiman and Iswar Saran—for Opposite Party.

Judgment.—This is an application for criminal revision of certain proceedings connected with property within the District of Gorakhpur. The proceedings are proceedings purporting to have been taken under S. 145, Criminal P. C. The application in this Court was filed on 21st December 1918. The applicant prayed that this Court might be pleased to call for the record and quash all proceedings on the following grounds: (1) Because the proceedings are absolutely without jurisdiction and are illegal. (2) Because the right and title to possession having been just decided by a competent Court, fresh proceedings, ostensibly under S. 145, Criminal P. C., cannot be started with the object of continuing the attachment of the property. (3) Because the order, dated 23rd July 1918, attaching the property is under the circumstances beyond the competence of the criminal Court. (4) Because the jurisdiction of the criminal Courts has ceased with the decision of the civil Court. The application was admitted on the grounds stated therein and in consequence the record is now on the table before me. The property in dispute is said to be property attached to a math called Asthan Gorakhnath. Part of it is situate somewhere, I am told, in Tahsil Sadar and the greater part of it in Tahsil Maharajganj. It apparently is conceded on both sides that there have been various disputes regarding this property and these disputes have resulted in cases instituted in criminal Courts of Gorakhpur.

It is contended on behalf of Baba Sunder Nath that those cases represent cases of serious offences in the Penal Code. According to him riots have multiplied and there has been damage to property.

On the other hand looking to the result of the cases and the orders issued upon them, either these cases were not of the serious nature alleged, or they have been grappled with by punishments which would lead to an inference that the proceedings were not so serious as has been alleged. Be that as it may, two cross suits in the civil Courts had been instituted and both of these were decided by the Subordinate Judge of Gorakhpur, and that as recently as 15th of June 1918. While these civil suits were pending, a considerable portion of the property in dispute, partly situate in Tahsil Sadar and partly situate in Tahsil Maharajganj, was under attachment by the Magisterial authorities. It appears that as soon as the Subordinate Judge of Gorakhpur decided the cases before him, an application was made by Baba Brahma Nath to the Subdivisional Magistrate, Sadar, stating that he, Brahma Nath, had been held in the judgment of the civil Court to be in possession. The judgment needs careful perusal, for the civil Court held that though Brahma Nath had failed to prove that Baba Sundar Nath was deposed and that Brahma Nath was made Mahant, yet it held Brahma Nath entitled to possession of the property and ordered him to explain the accounts to Sundar Nath. As I say, there is more in the judgment, but for the purposes of the proceedings before me I do not think it necessary to recapitulate all that has been stated, but to go at once to the order of the civil Court which is to the effect that the attachment made of any property of the temple should be withdrawn in all cases. Brahma Nath was held by the civil Court entitled to possession and all the property attached was now to pass into the possession of Brahma Nath, who was liable to explain the accounts to Sundar Nath. The Tahsil Sadar acting upon this order released all the property attached within the jurisdiction of the Subdivisional Magistrate of Sadar.

On 1st July 1918 Baba Brahma Nath applied to the Subdivisional Magistrate of Maharajganj asking that the village Ubrichak situate within his jurisdiction should be similarly released. The Subdivisional Magistrate of Maharajganj, therefore addressed the District Magistrate of Gorakhpur stating that he agreed with the Subdivisional Magistrate of Sadar and asking for an order from the

District Magistrate. The opinion of both these officers is said to have been that a fresh case under S. 145, Criminal P. C., should be started in respect to all the immovable property belonging to the math of Gorakhnath Asthan situate within Tahsil Sadar as well as within Tahsil Maharajganj and asking that some particular Magistrate might be ordered to try and dispose of the case in respect to the entire property. This points to the matters before the Subdivisional Magistrates being proceedings and not cases. If they were cases, this communication between the Subdivisional Magistrates and the District Magistrate was entirely out of order. On 20th July the District Magistrate recorded the following order :

"It having been brought to my notice that there has been a dispute regarding the title to the management of the immovable property of the Asthan of Gorakh Nath, and that this dispute is likely to be the occasion of a breach of the peace, I direct that proceedings under S. 145, Criminal P. C., be taken in respect of this property. The property not being all situate in one subdivision, I direct that the proceedings in respect of the whole property be taken by Pandit Badri Narain Misra, Deputy Magistrate 1st Class."

It is claimed by the learned counsel for Baba Sundar Nath that the District Magistrate was competent to pass this order under S. 192, Criminal P. C. S. 192 authorizes a District Magistrate to transfer a case of which he has taken cognizance for inquiry or trial, to any Magistrate subordinate to him. It may be open to question whether by passing this order of 20th July, the District Magistrate can be said to have taken cognizance of the case and further it may be questioned whether S. 192 has any reference whatever to proceedings under S. 145, Criminal P. C. Ch. 12, in which S. 145 and the following sections are to be found, very carefully avoids mentioning the word "case" at all. It talks of disputes and of proceedings, but nowhere of cases; and a third difficulty arises whether if transfer was authorized under S. 192, the transfer was to a Magistrate competent under the Code. The Magistrate selected by the District Magistrate of Gorakhpur was directed to pass orders in connexion with property part of which was not within the local limits of the jurisdiction of Subdivision Maharajganj. Further the District Magistrate, if he took cognizance of the case, had to be satisfied that a dis-

pute likely to cause a breach of the peace existed concerning land within his jurisdiction. He had to make an order in writing, stating the grounds of his being so satisfied. He had to require the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by him and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The District Magistrate in his order of 20th July puts on record not one of these steps. If we pass on to the order passed by the Subdivisional Magistrate of Maharajganj, we shall find a notice issued on 23rd July 1918. In this notice the Subdivisional Magistrate of Maharajganj does set out that he is satisfied that a dispute likely to cause a breach of the peace exists concerning immovable property. He then goes on to shelter himself behind an order of the District Magistrate, but he nowhere states the grounds of his being satisfied that such a dispute does exist.

It may seem to use a proverbial expression, that this is "dotting i's and crossing t's with a vengeance;" but it has been held over and over again by this Court, for example, in *Jhingai Singh v. Ram Pratap* (1), that proceedings under S. 145 must be in intention, in form, and in fact proceedings under Ch. 12, Criminal P. C. by a Magistrate duly empowered to act under that chapter. The same has been held by a Divisional Bench of this Court in *Sayzeda Khatun v. Lal Singh* (2). It is true that in *Ganga Saran Singh v. Bhagwat Prasad* (3) to which I was a party (a case in which the initial order was defective, in that it did not set forth the grounds for the Magistrate being satisfied with the existence of a dispute likely to cause a breach of the peace), this Court declined in revision to interfere with the Magistrate's order but that was an exceptional case and we rightly or wrongly did not deem it expedient to exercise our power in revision. In the present case I deem it expedient to exercise my power in revision and I set aside the proceedings held by the Subdivisional Magistrate of Maharajganj.

(1) [1909] 21 All 150=1 I. C. 762.

(2) A. I. R. 1914 All. 71=25 I. C. 324=3; All. 233.

(3) [1910] 32 All. 132=5 I. C. 471.

A great deal was addressed to me upon the fact that there is a dispute likely to cause a breach of the peace, that the property in dispute will be in danger of being badly administered, that the math of Gorakhnath is in danger of being misused if not misappropriated, but all this is really irrelevant to the matter before me. I cannot overlook the fact that a civil Court whose competence has been nowhere attacked in the course of the argument, has passed an order directing possession to be given to Brahma Nath over the property in dispute. That order can be taken before, and I believe at the present moment is being taken before a competent civil Court in appeal. The Civil Procedure Code gives ample power over property which can be shown to be in danger of being misappropriated or wasted being protected without having resort to a criminal Court to pass orders contrary to civil Court orders which up to the present have not been disturbed. The criminal Court also had ample jurisdiction provided the facts had been properly stated to it of binding the parties over to keep the peace. Orders under S. 107 can be so framed as to make it not worth while for either party to attempt a breach of the peace, and for these reasons I do not deem it expedient that action should be taken under S. 145, especially since orders have been passed by a Magistrate whose jurisdiction is open to doubt and which are not in intention, form or fact, proceedings under Ch. 12, Criminal P. C. The proceedings are entirely set aside and the parties will revert to the status immediately preceding the institution of these proceedings. Let the record be returned.

v.B./R.K.

*Record returned.***A. I. R. 1919 Allahabad 314**

RICHARDS, C. J. AND BANERJI, J.

Karehru and another—Defendants—Appellants.

v.

Mathura Prasad—Plaintiff—Respondent.

Second Appeal No. 210 of 1917 Decided on 4th January 1919, from decree of Dist. Judge, Agra.

Agra Tenancy Act (1901), Ss. 154 and 177—Resumption proceedings—Appeal—No question of proprietary title in issue in appeal from order of Collector—Appeal to Commissioner is competent.

A zamindar took proceedings to resume certain

land under S. 154. The defendant pleaded that the land was not resumable under that section and also that he had held the land rent-free for more than fifty years and by two successors. The Collector held that the land was resumable under S. 154 and passed a decree for ejectment. The defendant appealed to the Commissioner. By his memorandum of appeal he contended, first, that the suit was barred by limitation; secondly, that the land was not held at the pleasure of grantor; thirdly, that the land was a charitable grant and, therefore not resumable; fourthly, that the Court should have proceeded under S. 158, Agra Tenancy Act. The Commissioner dismissed the appeal and the defendant filed an application in revision before the Board of Revenue, who held that the land was not resumable and remitted the case back to the Court of first instance to deal with the other issues. The matter coming again before the Assistant Collector, he held that S. 158 applied and declared that the defendant should be deemed to be a proprietor and proceeded to fix the revenue. The plaintiff zamindar appealed to the District Judge, who declared that the appeal to the Commissioner, the application for revision to the Board of Revenue and the second hearing by the Assistant Collector were all null and void, and further proceeded to declare that the original decision of the first Court had become final:

Held: (1) that there being no question of proprietary title in issue in the appeal in the resumption proceedings, the appeal had been rightly entertained by the Commissioner, and that the decision of the Board of Revenue could not be treated as null and void;

(2) that, therefore the Assistant Collector was right in determining the matter upon remand and that the District Judge should have decided the appeal on the merits. [P 315 C 2]

Gulzari Lal—for Appellants.

Durga Charan Banerji—for Respondent.

Judgment.—This appeal arises under the following circumstances: A zamindar took proceedings before an Assistant Collector of the first class to resume certain land under S. 154, Tenancy Act. The defendant pleaded that the land was not resumable under that section and also that he had held the land rent-free for more than fifty years and by two successors. The Collector held that the land was resumable under S. 154 and passed a decree for ejectment. The defendant appealed to the Commissioner. By his memorandum of appeal he contended, first, that the suit was barred by limitation; secondly, that the land was not held at the pleasure of the grantor; thirdly, that the land was a charitable grant and therefore not resumable; fourthly, that the Court should have proceeded under S. 158. The Commissioner dismissed the appeal and the defendant filed an application in revision before the Board of Revenue, who held that the land was not

resumable and remitted the case back to the Court of first instance to deal with the other issues. The matter coming again before the Assistant Collector he held that S. 158 applied and declared the defendant should be deemed to be a proprietor and proceeded to fix the revenue. The plaintiff zamindar appealed to the District Judge, who declared that the appeal to the Commissioner, the application for revision to the Board of Revenue and the second hearing by the Assistant Collector were all null and void, and further proceeded to declare that the original decision of the first Court had become final.

It is not quite easy to see how the learned District Judge could take it upon himself to restore any decree—he might no doubt have allowed the appeal and set aside the decree of the Assistant Collector on the ground that he had no jurisdiction to pass the decree; but it is difficult to see how he could go any further. It appears that no exception was taken by the zamindar to the original appeal to the Commissioner on the ground that he had no jurisdiction to hear the appeal, nor does it appear that any objection was taken to the hearing of the application for revision by the Board of Revenue, nor was any objection taken apparently to the re-hearing of the case by the Assistant Collector as the result of the order of the Board of Revenue. The view taken by the learned District Judge was that the appeal against the original decision of the Assistant Collector did not lie to the Commissioner and that consequently all proceedings were absolutely null and void, except the original decision of the Assistant Collector and there not having been any valid appeal against that decree it had become final. Under the Tenancy Act appeals lie from the decisions of the Court of the Assistant Collector to the Commissioner when proceedings are taken under S. 154 and, therefore prima facie the appeal to the Commissioner in the present case was correct. S. 177, however provides for appeals in certain cases to the District Judge and amongst others in all suits in which a

“question of proprietary title has been in issue in the Court of first instance, and is a matter in issue in the appeal.”

It is contended on behalf of the respondent to the appeal before us that because in the fourth ground in the memorandum

of appeal to the Commissioner the then appellant stated that proceedings should have been taken by the Assistant Collector under S. 158, Tenancy Act, a question of proprietary title was a matter in issue in the appeal and, therefore the appeal should not have been made to the Commissioner. Assuming (but without deciding) that ground No. 4 did raise a question of proprietary title, and bearing in mind that as a matter of fact no decision was come to on this alleged question of proprietary title, and bearing in mind also that it does not appear that evidence was given or arguments addressed upon this question before the Commissioner, it is a little difficult to say that the question was “in issue” before the Commissioner, that is to say, was “in issue in the appeal.” In the course of the argument we asked whether it could be said that the question of proprietary title was “in issue in the appeal,” if after the appeal had been filed it had been struck out or abandoned, or if the Commissioner had declined to frame any issue on this point, and it had practically to be admitted that in such a case it could not be said that the question of proprietary title was “in issue in the appeal.” We think under the circumstances of this case that the question of proprietary title was not “in issue in the appeal” before the Commissioner, and that accordingly the decision of the Board of Revenue cannot be treated as null and void. This being so the Assistant Collector was right in determining the matter upon remand and the learned Judge was wrong in not deciding the appeal upon the merits. We accordingly allow the appeal, set aside the decree of the District Judge and remand the case to him with directions to re-admit the appeal upon its original number on the file and proceed to hear and determine the same having regard to what we have said above. Costs here and hitherto will be costs in the cause.

V.B./R. K.

Case remanded.

A. I. R. 1919 Allahabad 315

RAFIQUE, J.

Parmeshwari Das and others—Applicant.

v.

Jagan Nath—Opposite Parties.

Criminal Revn. No. 223 of 1919, Decided on 21st May 1919.

Criminal P. C. (1898), S. 403—Applicability—S. 403 does not apply to case in which accused has been discharged.

Section 403 applies only to cases of acquittal or conviction, and has no application to a case in which an accused person has been discharged. [P 316 C 1]

E. A. Howard—for Applicant.

P. N. Banerji—for Opposite Parties.

Judgment.—The applicant in this case is one Parmeshwari Das, who prosecuted the opposite party on charges of rioting and illegal confinement. The case was made over to a Bench of Honorary Magistrates who after taking the evidence made an order on 18th January 1919 discharging the opposite party of the offence of rioting and illegal confinement. The Bench however framed a charge-sheet under S. 323 and fixed 10th February 1919 as the date for hearing. In the meantime the applicant Parmeshwari Das has applied to the District Magistrate for transfer of his case from the Bench of Honorary Magistrates and his application was disallowed. On 10th February 1919, when the case came up for hearing, the Bench of Honorary Magistrates, without proceeding any further with the case, made an order that as the opposite party had been discharged by them on 18th January 1919 the case could not proceed under S. 403, Criminal P. C. The case was struck off. It is from this order of 10th February 1919 that Parmeshwari Das has come up in revision to this Court and contends that S. 403, Criminal P. C. has no application whatsoever. I think that the contention is well founded. The section in question applies to cases of acquittal or conviction and not to cases of discharge. The order striking off the case from the list of the Bench of Honorary Magistrates was illegal. I set it aside and direct the Bench to dispose of the case according to law.

V.B./R.K.

Order set aside.

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LINDSAY, J.

Jai Jai Ram—Applicant.

v.

Emperor—Opposite Party,

Criminal Revn. No. 17 of 1919, Decided on 21st February 1919.

Penal Code (1860), S. 193—Person placing signature on written report without knowing its contents—Act does not amount to offence under S. 193.

The mere fact of a person placing his signature on a written report, without knowing its contents, is no ground for holding that the neces-

sarily knew or had reason to believe that the contents of the report were false; at most, the act is indiscreet and does not amount to an offence under S. 193. [P 317 C 1]

Nihal Chand—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This is an application for revision on behalf of one Jai Jai Ram who has been convicted of an offence under S. 193 read with S. 114, I. P. C. The charge against him was:

"that on or about the 4th April he abetted the fabrication of a false report, Ex. A. (meant to show that the halwai could not be identified) inasmuch as he knew it to be a false report, and countersigned it with the intention that it might appear in evidence in a judicial proceeding and might cause the Court to form its own opinion about the guilt of Brij Mohan."

In order to understand the nature of the charge against the accused it is necessary to refer to a few facts. On 4th April 1918 a woman named Mt. Kesri, who is now dead, went to the police station at Tanakpur with her little girl aged nine years and complained that the girl had been assaulted by a halwai whose name she did not know. She described this affair as having taken place four days previously and said that the girl had been bleeding. The report was taken down by head constable Krishnanand and he recorded it in the general diary under S. 323, remarking that the child's mother did not desire to have any medical investigation. It appears however that the mother at once took the child to a hospital where she was examined by the Lady Doctor, Miss Butcher. Miss Butcher found that the girl had been raped and sent information accordingly to the police station. Later on in the afternoon Mt. Kesri brought a written report, Ex. A, which is proved to have been written by a man named Hayat Singh and which was admittedly attested by the present applicant Jai Ram. In this Kesri stated that she did not know who the man was who had violated her daughter. She said that the girl had not disclosed what had happened, and that she (the mother), thought the child was suffering from dysentery. Kesri went on to say that she was unable to identify the person who was responsible for the rape and so was her daughter, and the report concluded with a statement to the effect that no investigation was desired.

Some time after this it came to knowledge that a man named Brij Mohan had raped this child; he was tried for the

offence, found guilty and sentenced to ten years' rigorous imprisonment. The only solid fact on the record against the accused is the fact that he attested this written report which was brought to the Thana on the afternoon of the 4th April. It was for the prosecution to prove that Jai Jai Ram knew that this written report was a false report and that he countersigned it with that knowledge and with the intention that the report should be used as evidence in a judicial proceeding. The learned Judge of the Court below has discussed the whole question of the applicant's knowledge at great length, but it seems to me there is no foundation of fact for the conclusion at which the learned Judge has arrived. It cannot be concluded that because this man Jai Jai Ram put his signature to this written report he necessarily knew or had reason to believe that the contents of the report were false. It is not made to appear from any evidence that the contents of the report were read out to him and though it may be a very foolish thing for a man to attest a document of this kind without being made aware of the contents, this indiscretion does not amount to an offence under the Penal Code.

Various other circumstances have been taken into consideration by the learned Judge for the purpose of imputing guilt to the accused. The principal one seems to be that Jai Jai Ram is a near neighbour of the man Brij Mohan who was found guilty of the charge of rape, and so it is assumed that by reason of his living in the neighbourhood he must have been aware that Brij Mohan was the person who committed the rape upon the child. Here again this assumed knowledge has been too readily attributed to Jai Jai Ram and there is no foundation of fact to justify it. To say that because Jai Jai Ram lives on the other side of the road from Brij Mohan he must necessarily have known that Brij Mohan had committed the rape on this child, is surely going too far. The statement of Jai Jai Ram is that the report was written by a man called Hayat Singh, who asked him as he was passing by to put his name to it and that he did so. There is no evidence on the record to contradict this statement of the accused and I think in the circumstances the statement is probably a true one. The result is that

I find that there is no evidence to support the charge and conviction. I allow the application, set aside the conviction and sentence and direct that the accused be acquitted and released. He is on bail; his bail bond will be discharged.

V.B./R.K. *Conviction set aside.*

A. I. R. 1919 Allahabad 317

KNOX, AG. C. J. AND BANERJI, J.

Jwala Singh and others—Defendants—Appellants.

v.

Sardar and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 36 of 1917, Decided on 8th May 1919 against the judgment of Walsh, J., dated 8th February 1917.

Hindu Law—Succession—Sons of Kshatriya by Shudra woman—His illegitimate sons cannot succeed to his property.

The son of a Kshatriya by a Shudra woman belongs to a caste higher than a Shudra called Ugra, and his illegitimate sons, therefore cannot succeed to the property which belonged to him.
[P 317 C 2 P 318 C 1]

Gulzari Lal and S. M. Mukherji—for Appellants.

Vishnu Nath—for Respondents.

Judgment.—The suit out of which this appeal arises was brought by the plaintiffs-respondents to recover possession of two cultivatory holdings, namely the whole of Khata No. 32 and a fourth share in Khata No. 50. The holding in Khata No. 32 has been found to have been the non-occupancy holding of one Patpal Singh. The plaintiffs are the illegitimate sons of Patpal Singh. The defendants are his brothers. It has been found that Patpal Singh was the son of one Debi Singh who was a Kshatriya. Patpal Singh's mother was a Shudra and the question is what was the status of Patpal Singh. If he was a Shudra his illegitimate sons, the plaintiffs, would succeed to his holding. If he belonged to some higher caste the illegitimate sons would have no right of succession. The point does not appear to have been decided by this Court, but it was considered in an elaborate judgment of the Madras High Court. In the case of *Brindavana v. Radhamani* (1) it was held that the illegitimate son of a Kshatriya by a Shudra woman is not a Shudra but was of a higher caste called "Ugra." This view is supported by the authorities cited in

(1) [1889] 12 Mad. 72.

the judgment and we have not been referred to any case in which a contrary view has been held. We think upon the authorities we should follow the view adopted by the Madras High Court. The result is that Patpal Singh belonged to a higher caste than that of a Shudra and therefore his illegitimate sons would not succeed to the property which belonged to him. In this view the plaintiffs' claim failed and should have been dismissed. We allow the appeal, set aside the decree of this Court and of the Courts below and dismiss the suit with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 318 (1)**

RICHARDS, C. J. AND RAFIQUE, J.

Sundar Singh and others—Defendants—Appellants,

Jaisiri Rai—Plaintiff—Respondent.

Second Appeal No. 1264 of 1917, Decided on 15th February 1919, from decision of District Judge, Azamgarh, D/- 6th September 1917.

Wajibularz — Custom of pre-emption—Only entry in wajibularz is not sufficient to establish custom—Pre-emption.

In a pre-emption suit the only evidence adduced by the plaintiff in support of the alleged custom was an extract from the wajibularz, which was to the effect that in future the co-sharers when selling property must offer it to the other co-sharers:

Held: that in the absence of all other evidence the entry in the wajibularz was not sufficient to establish the custom. [P 318 C 2]

Iqbal Ahmad—for Appellants.

Saila Nath—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. The Courts below decided the suit in the plaintiff's favour. The vendee appealed. The only evidence adduced by the plaintiff in support of the alleged custom was an extract from the wajibularz of 1872. This entry is to the effect that in future the co-sharers when selling must first offer the property to the other co-sharers; and the expression 'ainda' in the clause is explained by a rukka, which is also on the record, by the settlement officer to the effect that when he used this word he meant that the particular custom had not been established. Some reference has been made to judgments, but upon sending for the records of these judgments we find that they were not pre-emption cases at all. There was also a judgment in another case and apparently from an-

other village by the District Judge of Azamgarh. From the perusal of this judgment it appears that in that case there was not only an extract from the wajibularz of 1872 but there was an entry in an earlier wajibularz. The question in the present case is whether the entry in the wajibularz of 1872 under the circumstances of this case is sufficient to establish the custom, and in the absence of all other evidence we think it was not sufficient.

If an earlier wajibularz containing a reference to rights of pre-emption had been produced in the case it would have made all the difference. We must allow the appeal, set aside the decree of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 318 (2)**

PIGGOTT AND WALSH, JJ.

Jassa and others — Plaintiffs—Appellants.

Rangi Lal and others — Defendants—Respondents.

First Appeal No. 92 of 1916, Decided on 7th March 1918, from decree of Sub-Judge, Saharanpur.

Civil P. C. (1908), S. 11—Co-defendants—Mortgage suit—Mortgagor and prior mortgagee impleaded as defendants—Mortgagor denying liability under prior mortgage—Issue tried between parties—Subsequent suit by mortgagor for declaration that prior mortgage was not binding upon him is barred.

A puisne mortgagee brought a suit on the foot of his mortgage and impleaded the mortgagor and the prior mortgagee as defendants to the suit praying that the mortgaged property be sold subject to the prior mortgage. The mortgagor denied his liability under the prior mortgage, and an issue as to the validity and binding character of the prior mortgage was tried and decided against the mortgagor. Subsequently the mortgagor brought a suit for a declaration that the prior mortgage was invalid and was not binding upon him:

Held: that the suit was barred by the rule of res judicata. [P 320 C 2]

Damodar Das—for Appellants.

Pearey Lal Benerji—for Respondents.

Piggott, J.—Inasmuch as the substantial point taken in this appeal is the effect on the present suit of certain previous litigation, it may be convenient to begin at once with a statement of the facts regarding the said previous litigation, namely, a suit registered as No. 65 of 1914 in the Court of the Subordinate Judge of Saharanpur. That suit was

brought by one Radhe Lal on the basis of a simple mortgage of 8th February 1908. The principal defendants in that suit were one of the original mortgagors and the successors-in-interest of the other two, and the relief sought was a decree for sale. In the plaint however certain other defendants were also impleaded, namely, the heirs of one Sant Lal. In respect of these additional defendants it was alleged that they held one mortgage subsequent to that of 8th February 1908, on which Radhe Lal was suing, and also that they were in possession of the mortgaged property or part of it under two usufructuary mortgages prior in date to that of Radhe Lal, namely, one of 1st January 1888 and another of 13th March 1900.

These prior mortgages Radhe Lal did not offer to redeem. He prayed that the property might be brought to sale subject to the said mortgages. Those defendants who represented the original mortgagors not only contested their liability under Radhe Lal's mortgages, but they expressly pleaded that no liability attached to them in respect of the two mortgages of 1st January 1888 and 13th March 1900. They denied that the heirs of Sant Lal were actually in possession under those mortgages. They denied that those mortgage deeds had been validly executed, or that consideration had passed or that in any event they, as sons and grandsons of two of the original mortgagors, were bound by their terms. The questions thus raised were expressly put in issue and were fully tried out in the aforesaid suit, No. 65 of 1914. On every point the finding was in favour of the validity and binding character of the two mortgages of 1888 and 1900. It was even found that the mortgagees were in actual possession of the property concerned in these two deeds. In the decree which followed it was not only ordered that the property should be sold subject to these two mortgages of 1888 and 1900, but that the costs of these defendants who represented the heirs of Sant Lal should be borne by those defendants who represented the original mortgagors. Having been defeated in this litigation, the representatives of the original mortgagors have come into Court with a suit which, I must say, strikes me as one of the most extraordinary that I have ever seen. They repeated their allegations that

the two documents as they called them, dated 1st January 1888 and 13th March 1900 were not validly executed and for other reasons as well were not binding upon them. They carefully suppressed the fact that the mortgages in question were in their terms usufructuary and that it had been found in the previous litigation that the mortgagees were in possession in accordance with the terms of the deeds.

They threw out a suggestion, which it is clear they made no attempt to support that Radhe Lal as plaintiff in the former suit had been in some way in collusion with the heirs of Sant Lal in their capacity of prior mortgagees. They admitted that they had filed an appeal against the decision in Suit No. 65 of 1914, but that this appeal had been dismissed owing to failure on their part to deposit the necessary court-fees. They have got round the court-fee difficulty at any rate by bringing the present suit as one for a mere declaration. The declaration they ask for is that the documents dated 1st January 1888 and 13th March 1900 are not binding upon the plaintiffs and that the plaintiffs' share in the property "hypothecated," as they put it, under the said bonds cannot be sold by auction in execution of the decree of Radhe Lal in Suit No. 65 of 1914. They ask for this last relief without even impleading Radhe Lal as a defendant. They got round all difficulties on the subject of limitation by suggesting that a person asking relief under S. 39, Specific Relief Act, can create a new starting point of limitation for himself whenever he pleases by asking the person in whose favour the written instrument in question appears to operate according to its terms to rescind the same. The written statement filed in reply to this remarkable plaint is not very satisfactory. The main allegations set forth in the plaint were denied and it was pleaded that the plaintiffs had no cause of action in respect of either of the reliefs sought by them. The question of the usufructuary nature of the mortgages and the consequent right of the plaintiffs to claim further relief, beyond a mere declaration, were not raised. The defendants in the main contented themselves with the allegation that all the questions raised by this plaint had already been tried out between the parties in Suit No. 65 of 1914 and decided in favour of the present

defendants and against the present plaintiffs. The Court below, as a matter of fact, has disposed of the suit on this ground alone and the appeal before us is against that decision.

I have thought it worth while to call attention to the curious nature of the suit and the objections to which it is liable upon other grounds, but, as a matter of fact, I see no reason to dissent from the decision of the Court below on the one question tried out by it. The learned Subordinate Judge has been content to base his decision on the rulings in *Chajju v. Umrao Singh* (1) and *Magniram v. Mehdi Hossein Khan* (2). Both these decisions are in point and are sufficient authority for the view taken by the Court below. In argument on behalf of the appellants we have been asked more particularly to consider the decision in *Surjiram v. Barhamdeo Persad* (3). That case turned upon the question whether, upon a certain set of facts, the doctrine of constructive res judicata embodied in Expl. 4, S. 11 of the present Civil P. C., could be applied as between the parties to that litigation. There is no question of any constructive res judicata in the present case. The precise questions sought to be raised by the present suit were raised in Suit No. 65 of 1914, were pressed upon the Court by the pleadings of the present plaintiffs and were fully tried out upon evidence. Nor am I at all prepared to hold, with reference to the principle laid down in *Chajju v. Umrao Singh* (1), that the determination of these questions in Suit No. 65 of 1914 was not necessary in order to give an appropriate relief to the then plaintiff, Radhe Lal.

If the present plaintiffs had succeeded in the case, and the property had been ordered to be sold free from the mortgages of 1888 and 1900, the result would have been very greatly in favour of the present plaintiffs. So far as Radhe Lal was concerned, the actual result of the suit was to limit and specify the precise property against which his mortgage charge was to be enforced. He was not bound to implead the heirs of Sant Lal in their capacity of prior mortgagees, but there was nothing in the law to prevent him from doing so. On the pleadings, he had a cause of action against them on the

strength of a mortgage subsequent to the date of his own, as well as in respect of two prior mortgages. The decree which he asked the Court to give him was one for sale against the property hypothecated to him, subject to the rights of the usufructuary mortgagees under the deeds of 1888 and 1900. The result of the litigation, so far as he was concerned, was that he obtained an order for the sale of the property subject to certain defined and judicially ascertained charges, instead of an order, which he might no doubt have asked for, for the sale of the property subject to the rights of the heirs of Sant Lal, whatever those rights might hereafter be found to be. On all these grounds I think there is no force in this appeal and I would dismiss it with costs.

Walsh, J.—I agree. I think no question of law arises. The whole argument was based on a contention which is applicable, in my opinion, only to Expln. 4 and not to this case. It appears conclusively to have been found as a fact that the issue in question was directly and substantially in issue in a former suit between the same parties in a competent Court and was finally heard and dealt with.

By the Court.—The order of the Court is that the appeal is dismissed with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1919 Allahabad 320

RAFIQUE AND LINDSAY, JJ.

Mt. Wali Bandi Bibi—Defendant—Appellant.

v.

Mt. Tabeya Bibi—Plaintiff—Respondent.

Second Appeal No. 332 of 1917, Decided on 11th March 1919, against decision of Addl. Judge, Gorakhpur, D/- 13th December 1916.

* (a) Civil P. C. (1908), O. 6, R. 17—Property included in suit by amendment after transfer—Rule that amendment relates back to institution of suit does not apply.

The rule that the amendment of a plaint relates back to the date of the institution of the suit cannot be applied to every possible case, as for instance, where there is a question of the applicability of the rule of lis pendens, because in applying the rule of lis pendens it is essential that the property should be directly and specifically in question in the suit. Where therefore a plaint contains no such description as to put the vendee on his guard or to give him notice that the property he is purchasing is sub judice, an amendment of

(1) [1890] 22 All. 386.

(2) [1904] 31 Cal. 95.

(3) [1905] 1 C.L.J. 337.

the plaintiff by a change in the description of the property in suit would not for the purpose of the rule of *lis pendens*, relate back to the date of the institution of the suit. [P 322 C 1]

(b) **Mahomedan Law—Gift—Donee making addition—Right to revoke is barred.**

The Mahomedan law bars the right to revoke a gift if a transfer is made by the donee or any addition is made by him or his transferee to the gifted property by which its value is increased, [P 322 C 1, 2]

Iqbal Ahmad—for Appellant.

S. M. Sulaiman—for Respondent.

Judgment.—It appears that one Mt. Pir Bandi owned some house property in the town of Gorakhpur. She executed a deed of gift on 3rd November 1908 of seven items of property consisting of kothris and houses in favour of the widow of her son, Mt. Shafia Bibi. On 22nd February 1912, Mt. Pir Bandi instituted a suit against her daughter-in-law, Mt. Shafia Bibi for the revocation of the gift of 3rd November 1908. In the plaint of that suit it was alleged that items 1, 6 and 7 had been the subject matter of suit in a former litigation between an heir of the husband of Pir Bandi and the donee and that the gift in respect of these three items of property had been cancelled by a decree in favour of the heir of her husband. She therefore sued for the cancellation of the gift in respect of the remaining items of property including Nos. 2 and 5. Summons to the defendant, Mt. Shafia Bibi, was served on 16th March 1912. On 16th May 1912, item 6 was sold to Mt. Tabeya Bibi by Shafia Bibi in consideration of Rs. 1,000. On 21st May 1912, Mt. Pir Bandi filed an application for the amendment of her plaint in the suit that she had instituted on 22nd February 1912. She said that by a clerical error and oversight she had mentioned item 6 as having been in litigation between her husband's heir and Mt. Shafia Bibi, and had herself sued for the cancellation of items 2 and 5, while as a matter of fact it was item 5 which was in suit in the case of her husband's heir and she intended to sue and was suing in respect of items 2 and 6. She therefore prayed that wherever in her plaint No. 5 was mentioned it should be changed to No. 6. Her application was allowed on the same day, that is 21st May 1912 and the plaint was amended. Subsequent to the amendment Mt. Shafia Bibi added a plea to her defence that property item 6 had been sold by her for consideration on 16th May 1912 to Mt. Tabeya Bibi.

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In spite of this plea of Shafia Bibi, the vendee Mt. Tabeya Bibi was not brought on the record. The case proceeded to trial and the claim of Pir Bandi was decreed. The decree in that case however does not in any way bind Mt. Tabeya Bibi. On 15th May 1915, the suit out of which this appeal has arisen was brought by Mt. Tabeya Bibi for possession of the house No. 6 on the basis of the sale deed of 16th May 1912. The claim was brought against Mt. Wali Bandi, a niece of Pir Bandi to whom the house in suit had been transferred by Pir Bandi on 7th April 1914, under a deed of gift. The principal plea in defence was that the claim of the plaintiff was barred under the rule of *lis pendens*. The Court of first instance declined to accede to this plea and decreed the claim. On appeal the decree of the first Court was confirmed.

In second appeal to this Court various points have been urged against the decrees of the Courts below. The first and chief point is that the sale to Mt. Tabeya Bibi by the plaintiff-respondent was made during the pendency of the suit of Pir Bandi and therefore the sale is invalid. The contention is that under the law the amendment of a plaint relates back to the date of the institution of the suit and that for the purpose of *lis pendens* the suit becomes contentious from the date of its institution. In the present case, though there was a mistake in the description of a portion of the property in suit, yet by the amendment of 21st May 1912, the defect was cured and the suit should be taken to have been a contentious suit *qua* item 6 from 22nd February 1912, the date on which it was instituted. Some cases have been referred to us in support of the contention that the amendment relates back to the date of the institution of the suit. The contention may be correct with regard to certain pleas such as that of limitation, but we are not prepared to hold that the contention is true in every possible case. One of the matters that is essential for the application of the rule of *lis pendens* is that the property should have been directly and specifically in question in the suit. Bennet in his work on *lis pendens* says:

"It may be said in general that a *lis pendens* will be created whether the property involved in suit is described either by such definite and tech-

nically legal description that its identity can be made out by the description alone, or where there is such a general description of its character or status and by such reference that upon inquiry the identity of the property involved in litigation can be ascertained."

In the present case at the time of the sale of house No. 6 to Mt. Tabeya Bibi, the plaintiff of Pir Bandi had no such description as to put the vendee on her guard or to give her notice that the property that she was purchasing was subject to a former litigation and therefore Pir Bandi was seeking no relief in respect of it. The property may be said for the first time to have come directly and specifically into question on 21st May 1912 when the amendment was allowed. The amendment of the plaintiff by a change in the description of a portion of the property in suit cannot, for the purpose of the rule of *lis pendens*, relate back to the date of the institution of the suit. We think that the lower Courts were right in holding that the plaintiff-respondent could not be defeated on the rule of *lis pendens*.

Another point that has been urged on behalf of the defendant-appellant is that Mt. Tabeya Bibi, being a vendee from Mt. Shafia Bibi who was a donee from Mt. Pir Bandi, cannot claim to have a better title than that of Shafia Bibi. The gift in favour of the latter was revoked by a decree of Court and the sale to Tabeya Bibi, therefore falls to the ground. In the sale deed itself Mt. Shafia Bibi described her title to the property she was selling as that of a donee and Mt. Tabeya Bibi, knew and ought to have known that under the Mahomedan law the gift was revocable. All that Mt. Tabeya Bibi took by her sale was the title of Shafia Bibi, whatever that title was. This point was not urged either in the written statement or in the Court of first instance or in appeal before the lower appellate Court. It is taken for the first time before us. We do not think that the appellant should be allowed to put up a new case before us. But we do not propose to decide the question on a technical ground. It appears that under the Mahomedan law the right to revocation of a gift is barred for among other reasons, a transfer made by the donee or by any additions made by the donee or her transferee to the gifted property by

which its value has been increased, vide Wilson's Mahomedan Law, para. 316, p. 354. In the present case, Mt. Shafia Bibi had sold the property to the plaintiff-respondent and therefore the gift in respect of house No 6 could not be revoked. The argument that as a matter of fact a decree for revocation has been passed in favour of Pir Bandi is of no force, considering that the plaintiff-respondent was no party to that decree. She is not debarred from questioning the right of Mt. Pir Bandi to revoke the gift in the present case. Moreover as we understand the judgment of the lower appellate Court, the property has been dealt with by the transferee in such a way as to increase its value. Therefore on both the grounds the gift was not revocable at the instance of Mt. Pir Bandi. The appeal therefore fails and is dismissed with costs including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 322

RICHARDS, C. J. AND RAFIQUE, J.

Madho Ram—Defendant—Appellant.

v.

Jagat Singh—Plaintiff—Respondent.

Second Appeal No. 1664 of 1917, Decided on 14th February 1919.

(a) Civil P. C. (5 of 1908), O. 1, R. 9—**Pre-emption suit—Idol to whom property is endowed is necessary party.**

In a suit for pre-emption in respect of property endowed to an idol, idol is a necessary party and unless it is impleaded as a defendant the suit must fail on the ground that a decree cannot be recorded against a party who is not actually before the Court. [P 323 C 1]

(b) Civil P. C. (5 of 1908), O. 1, R. 9—**R. 9 deals with cases where Court decides rights of parties before it.**

Order 1, R. 9, deals with cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. [P 323 C 2]

(c) **Pre-emption—Notice—Presumption—One brother selling others must be presumed to know sale, in absence of quarrel—Hindu Law, Joint family.**

Where one brother in a Hindu family sells his property and there is no evidence of any quarrel, there is a strong probability that the other brother knows of the sale. [P 323 C 1]

Gulzari Lal and Tej Bahadur Sapr—for Appellant.

N. C. Vaish and Surendra Nath Sen—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. The property was sold on 21st February 1916. The vendee, although not actually a cosharer,

was a mortgagee in possession from the vendor and his brothers. On the following July (long before the institution of the present suit) the vendee endowed the property. The present suit was instituted on the very last day of limitation by the vendor's own brother without making the Thakurji a party. The first Court dismissed it on the ground that the Thakurji was a necessary party to the suit. It held that the evidence as to the consent to the sale was not sufficient. We may say in passing that there is a strong probability when one brother in a Hindu family sells his property and there is no evidence of any quarrel, that the other brother knows of the sale. We need hardly say that it stands to reason that where two Hindu brothers have not quarrelled a brother desiring to sell his property would be only too pleased to sell his property to his own brother rather than to a stranger, if his brother was in a position and wished to buy. The lower appellate Court held that the Thakurji was a necessary party and reversed the decree of the Court of first instance upon the ground that the suit against the Thakurji would not be barred. The Court thought that Art. 120, Lim. Act, would apply. We must bear in mind that the Thakurji was a necessary party to the present suit. If the effect of the deed of endowment was to vest the property in the Thakurji, then possession could only be got by virtue of a decree against the Thakurji. In the course of the argument the learned Counsel on behalf of the respondent was forced to admit that if the vendee had re-sold the property to an outsider, a decree for possession by pre-emption could not possibly be made in the absence of that third party. So far as the original vendee is concerned, he would have a complete answer to a suit for possession when he proved that he had re-sold the property and that it was no longer in his possession. An attempt has been made to distinguish between the Thakurji and a third party who had purchased property because it is said that the possession is still in the hands of the defendant in his capacity as trustee. But it seems to us that he is in possession in an entirely different capacity. He was not sued as trustee, he was sued in his personal capacity. No doubt the Court has power to add a defendant. The Court of course would not add a de-

fendant where it was clear that at the time he would be added as a defendant the claim was barred as against him. The Court below considered as we have already stated, that Art. 120, is the appropriate article, and that the suit would not be barred as against the Thakurji if he was made a party. We think it unnecessary in the present case to decide what is the appropriate article, but the fact remains that the Thakurji even upto the present time has not been made a party to the suit. We are asked that even now this Court should amend the pleadings by adding the Thakurji as a defendant. Bearing in mind the circumstances of the present case, namely the relationship between the vendor and the pre-emptor and the date upon which the suit was instituted we do not think that this is a case in which we are called upon to add parties at this stage. It is said that under the provisions of O. 1, R. 9, the suit ought not to be dismissed by reason of the non-joinder of the Thakurji. A careful perusal of that rule shows that it only deals with cases where the Court can deal with the matter in controversy in the suit with regard to the rights and interests of the parties actually before it. The matter involved in the present case is the possession of the property sold. On the finding of the Court below and in our opinion also, this property is now in the possession of the Thakurji and it is impossible that we can give a decree against the Thakurji who is not before us. We must allow the appeal set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this court-fees on the higher scale.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 323**

STUART, J.

Badri—Petitioner—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 110 of 1918, Decided on 31st July 1919, against order of Dist. Judge, Gorakhpur, D/- 14th May 1918.

Penal Code (45 of 1860), Ss. 209 and 210—For Ss. 209 and 210 question whether Court had jurisdiction or not is immaterial.

In order to bring a case under S. 209 it is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit. The words in the section are "a Court of justice" and not "a Court of justice having jurisdiction." Similarly, a person obtains a decree

fraudulently for a sum not due, the case would fall under S. 210 of the Code, whether the Court had, or had not, power to pass the decree.

[P 324 C 2]

R. K. Sorabji—for Applicant.

R. Malcomson for *A. E. Ryves* — for the Crown.

Judgment. — The four applicants, Badri, Jageshar, Raja Ram Pathak and Rameshar, filed about the same time four separate suits in the Court of the Village Munsif of Khajuri and obtained decrees therein. In execution of one of these decrees Jagat was imprisoned for 42 days. The learned District Judge of Gorakhpore under the provisions of S. 73, Local Act 3 of 1892, set aside all these decrees, on the finding amongst other findings that the Village Munsif had no jurisdiction to decide the suits. He further found that the suits were deliberately false and that they had been instituted in pursuance of a conspiracy to prosecute Jagat, because Jagat had exposed a scandal in Jageshar's family the disclosure of which had put Jageshar to considerable expense and damaged the reputation of himself and his relations. The learned District Judge after having arrived at this conclusion and setting aside the decrees, proceeded to take action under S. 476, Criminal P. C., and has ordered the four applicants to be prosecuted criminally on various charges. One of the charges under which he has ordered each applicant to be prosecuted is a charge S. 209.

The applicants apply in revision to have this order set aside. The applications are under the provisions of S. 115, Civil P. C. Now there is nothing to show that the learned District Judge exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction so vested or that he acted in the exercise of his jurisdiction illegally or with material irregularity; and here I might leave the matter and dismiss the applications. But inasmuch as other Judges of this Court have thought fit to admit these applications and as the proceedings have already dragged on for some 14 months, it will perhaps be better to examine the arguments put forward by the learned counsel for the applicants. The learned counsel argues that inasmuch as the Munsif had no jurisdiction, his clients can in no circumstances have committed an offence under either Ss. 209 or 210. The words of S. 209 are:

"Whoever fraudulently or dishonestly, or with

intent to injure or annoy any person, makes in a Court of justice any claim which he knows to be false, shall be punished with imprisonment" and S. 210 is to the effect that

"whoever fraudulently obtains a decree or order against any person for a sum not due, or fraudulently causes a decree or order to be executed against any person for anything is liable for imprisonment."

Now on the learned Judge's finding, which is the only finding with which I am concerned, these four persons fraudulently, dishonestly and with intent to injure Badri, misrepresenting their residence, went to a Court which they knew had no jurisdiction and obtained by the use of the most dishonest methods decrees for sums not due to them, and in one instance obtained the imprisonment of Jagat for six weeks. It would have been an extraordinary defect in the Penal Code if such acts could pass unpunished, because the Court had no jurisdiction, but I see no reason to suppose that the law contains this defect. The words in S. 209 are "a Court of justice" not "a Court of justice having jurisdiction in the case." If a person brings a claim in a Court of justice which has no jurisdiction the case falls under S. 209 in my opinion, and similarly, if he obtains a decree fraudulently for a sum not due, the case will fall under S. 210, whether the Court had, or had not, power to pass the decree. In these circumstances there would be no force in the argument that there is a legal flaw in the charge even if the argument could be pressed under S. 115.

I dismiss these applications with costs. I fix the fees of the Government Advocate at Rs. 32 on each application.

V.B./R.K. *Applications dismissed.*

A. I. R. 1919 Allahabad 324

TUDBALL AND RAFIQUE, JJ.

Brij Narain Rai—Defendant—Appellant.

v.

Mangla Prasad and *another*—Plaintiffs—Respondents.

First Appeal No. 78 of 1916, Decided on 28th October 1918, from decree of Sub. Judge., Ghazipur.

(a) Civil P. C. (5 of 1908), O. 32, Rr. 3 and 4—Suit against minor—Notice of proposed appointment of Guardian ad litem not issued to guardian—Suit decreed *ex parte*—Decree is not binding.

A suit was brought against certain minors who were under the custody of their mother. Notice was issued to the minors for the appointment of

a guardian ad litem but no notice was issued to the mother and eventually the Court Nazir was appointed guardian ad litem of the minors, but no notice of his proposed appointment was issued either to the minors or to their mother. No funds were supplied to the Nazir to enable him to take steps to protect the minors' interests, no defence was put in on behalf of the minors and the suit was decreed ex parte against them:

Held: that the provisions of O. 32, Rr. 3 and 4, had not been complied with and that the minors, not having had an opportunity of putting forward a defence, were not bound by the decree passed in the suit. [P 325 C 2]

(b) Hindu law—Debts—Antecedent debts—Meaning of—Explained.

The expression "antecedent debts" means debts incurred to discharge not only obligations antecedently incurred, but incurred wholly irrespective of the ownership of the joint family property; in other words, personal debts incurred by the father for his own purposes and apart from the security of the joint family property.

[P 326 C 2; P 327 C 1]

S. M. Sulaiman and Ishaq Khan—for Appellant.

Kamalakanta Varma and Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal, which is by the defendant, arises out of a suit brought by the two minor plaintiffs, seeking to have set aside an ex parte decree obtained by the defendant on 27th November 1912 in a suit brought against them and their father on the basis of a mortgage-deed, dated 4th March 1908, which their father had executed in lieu of Rs. 11,000 and in which he had mortgaged the joint ancestral property. The father Sita Ram Rai was also made a defendant to the suit. The plaintiffs in this case pleaded that they had not been duly represented by a properly appointed guardian in the previous litigation; that they had therefore been prejudiced and that the decree should be set aside as null and void. The defendant appellant, who is the appellant now before us, pleaded that the minors had been properly represented in the previous litigation. Further that the bond of 4th March 1908 was a genuine deed for consideration and was executed to pay off antecedent debts; that the mortgage was therefore binding on the plaintiffs and they had no right to impeach it as the sons of their father.

There was a further plea that the property, was not ancestral property but the self-acquired property of the father. The Court below held that the property in question was the ancestral property of the family; that the minors had not been properly represented in

the previous litigation. Further that out of the consideration of Rs. 11,000, Rs. 735 were not for antecedent debt or family necessity and this being so, the whole mortgage was not binding upon the plaintiffs in any way. It therefore decreed the suit and set aside the previous decree as null and void as against these plaintiffs. In the memorandum of appeal filed in this Court the first ground of appeal was that it had not been established that the property in suit was the ancestral property of the plaintiffs and that therefore they were not in a position to question the mortgage. In regard to this it is admitted before us that with the exception of one small portion of oral evidence there is no evidence on the record to support the plea. Furthermore the judgment of the Court below shows that this plea was not pressed in that Court. We therefore must hold on this point against the appellant and for the purpose of this appeal the property must be deemed to be ancestral property.

The next point pleaded is that the plaintiffs-respondents were duly represented according to law in the course of the former litigation. On this point we find it impossible in any way to differ from the decision arrived at in the Court below. In the former litigation the present appellant who was then the plaintiff, asked the Court to appoint the father the guardian of the minors. It is obvious in a litigation of this description that the father's interests and the son's interests are not one. Moreover in the present instance the father was not appointed guardian. The minors had a mother alive and they were under her custody. No notice whatsoever was issued to her. Notice was issued to the minors themselves.

In the end the Court Nazir was appointed by the Court as guardian ad litem of the minors, but no notice of his proposed appointment was issued either to the minors or their mother. No funds were supplied to the Nazir by the plaintiffs to enable him to take steps to protect the minors' interests. No defence was put in on behalf of the minors and the suit was decreed ex parte against them. It is quite clear that the provisions of O. 32, Rr. 3 and 4, were not complied with and the minors had no opportunity of putting forward a defence. On this point we agree with the Court below.

The next plea taken is that the plaintiffs' father having been the manager and the head of the family and the money having been borrowed by him in lieu of antecedent debts, the mortgage was binding upon the sons except perhaps for the small sum of Rs. 735, which was but a small proportion of the total debt of Rs. 11,000, incurred by the father. It is urged that the mortgage having been made in lieu of antecedent debts due from the father the sons were bound by the mortgage and therefore they had not been at all prejudiced and the decree should not be set aside except in respect of the small sum mentioned above. The mortgage-deed in suit, executed on 4th March 1908 (p. 20 A) was executed by the father and a loan of Rs. 11,000 was taken to pay off the debts due under two mortgagee-deeds, one of 12th December 1905 in favour of Sheikh Abdur Rahim and Haji Abdur Rahman, and the other of 19th June 1907 in favour of Hafiz Wali-ul-lah and Sheikh Akbar Ali. The whole sum of Rupees. 11,000 was paid in cash to the mortgagor Sita Ram Rai and the evidence shows that the money was actually utilised in paying off these prior mortgages. In view of the law laid down by their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1), prima facie the mortgage which is now in dispute was not executed for the payment of antecedent debts. In their judgment their Lordships remarked as follows:

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property."

In the present case the present mortgage was created in order to pay off two prior mortgages, that is debts which had been incurred prima facie on the security of the joint family property. If the facts remain at this and go no

further, we shall be constrained to hold in view of the decision of their Lordships mentioned above, that the present mortgage was not created to pay off antecedent debts and we shall have to dismiss this appeal without any further consideration. It is urged however that the two prior mortgages may well have been mortgages which were binding upon the estate in that they had been created for antecedent debts within the definition thereof given by their Lordships and quoted above. It is urged that if these mortgages were good mortgages binding upon the estate, then the present mortgage will also be equally good as it merely replaces those two. In other words, that the present mortgagee would be entitled to take his stand upon the mortgages of 1905 and 1907 and to recover whatever was legally due from the estate. It is further pointed out that under the law as it was understood previous to the decision in *Sahu Ram Chandra v. Bhup Singh* (1) the present mortgage would be held to be a good one and binding upon the estate; that the present mortgagee was a person who had no connexion in any way with the former mortgages; that he advanced his money in good faith after due inquiry as to the existence of the prior debts and taking the law as it was understood previously, he was justified in advancing his money on the security of the property. We think that there is considerable force in this argument and that in view of the fact that the present case was decided by the Court below some two years or so prior to the decision in *Sahu Ram Chandra v. Bhup Singh* (1), we ought to allow the plaintiff an opportunity of establishing the fact that the two prior mortgages of 1905 and 1907 were binding upon the estate, in that they were executed for antecedent debts of the father. It must be clearly understood that the words "antecedent debts" must be read within the clear meaning of the ruling in *Sahu Ram Chandra v. Bhup Singh* (1). It would be for the present appellant to show and prove that the debts incurred under those mortgages were incurred to discharge not only obligations antecedently incurred, but incurred wholly irrespective of the ownership of the joint family property. In other words, that they were personal debts incurred by the

(1) A. I. R. 1917 P.C. 61=39 All. 437=39 I.C. 230=44 I. A. 126 (P.C.).

father for his own purpose and apart from the security of the joint family property. It will be open to the plaintiffs in the present case to establish the fact that these antecedent debts were incurred for immoral purposes or for purposes which would make them not binding upon them. For this purpose, we therefore remand the case to the Court below to take any further evidence adduced by the parties on this point. The additional evidence recorded by the Court below together with its opinion thereon will be submitted to this Court.

V.B./R.K.

Case remanded.

A. I. R. 1919 Allahabad 327

WALSH AND PIGGOTT, JJ.

Allauddin and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 422 of 1919, Decided on 25th June 1919, from order of Sess. Judge, Kumaun, D/- 25th March 1919.

(a) Penal Code (1860), Ss. 59 and 395—**Offence punishable with transportation for life or imprisonment for ten years—If transportation ordered not for life period should not exceed ten years.**

When an offence is punishable with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years.

Where therefore an accused, on conviction for an offence under S. 395, was sentenced to transportation for 15 years, the High Court reduced the sentence to transportation for a term of ten years, that being the period of imprisonment provided for the offence. [P 327 C 2]

(b) Criminal Trial—**Statement by approver not corroborated—His statement though not unreliable casts doubt and accused is entitled to benefit.**

Though the absence of any corroboration of the statement of an approver is not fatal to the conviction of a person named by him as one of the participators in an offence, it is nevertheless sufficient to cast doubt upon its justice and the accused is entitled to the benefit of the doubt.

[P 328 C 1]

A. S. Osborne—for Appellants.

L. M. Banerji—for the Crown.

Judgment.—This is an appeal by nine appellants against a conviction for dacoity by the Sessions Judge of Kumaun. Three of the appellants Allauddin, Tondi and Bhikhari have been sentenced to 15 years' transportation. During the hearing of the case it was pointed out to me, before whom originally the case came,

that the legality of this sentence was open to question. At my request the learned Chief Justice appointed two Judges to hear and determine the appeal in order to dispose of the question of the legality of the sentence by an authoritative decision. Since then however our attention has been drawn to the case of the *Queen v. Naiada* (1), in which a Full Bench decided that

"when an offence is punishable either with transportation for life or imprisonment for a term of ten years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment, namely, ten years."

That authority which dates from 1875 is binding upon us. And the section which we have to administer, namely, S. 395, I. P. C., is in precisely identical terms. We have therefore no alternative but to reduce the sentence in the case of Allauddin, Tondi and Bhikhari to a term of transportation for ten years. There is no substance in their appeals, their guilt is perfectly plain and speaking for myself I should have convicted Bhikhari on his own statement for rape. There is no doubt that a horrible rape was committed upon the wife of the complainant and it is a feature of the case that the woman has come forward and described what happened to her. I do not understand why the learned Judge acquitted this scoundrel, and he deserves a whipping as well as a severe term of transportation. However we cannot deal with the matter which has been disposed of by his acquittal. With regard to the other appellants Mr. Osborne, who has argued the case of all of them with his usual clearness, has drawn our attention to everything which can be said on their behalf and which comes to very little, and their appeals must be dismissed so far as their conviction is concerned with the exception of one, namely, appellant 9, Mahbub Shah. He is last on the record amongst the appellants, and was the last person to be arrested and possibly on that account but also possibly, as Mr. Osborne suggests, because he was only brought into the case on account of the statement against him by Karim Bakhsh, he was not in fact put up for identification and was not identified by anybody in the case. In fact upon any analysis of the evidence it appears that the statement of Karim Bakhsh, the approver, against him is totally uncorro-

(1) [1879] 1 All. 43 (F.B.).

borated in law. That is not a fatal objection to the conviction, but in our view it is sufficient to cast doubt upon its justice and moreover the learned Judge was not satisfied to act upon Karim Bakhsh's statement alone. He evidently thought that some corroboration was required to satisfy his own mind. Turning to the portion of the judgment which deals with this man's case we find that the learned Judge explained his reason for convicting him by the fact that in addition to the statement of the informer his name had been mentioned to the Mukhia by one of the co-accused when the first detailed information of the participants in the dacoity was given to anyone. The learned Judge, dealing with the mass of matter which he has done with great thoroughness, overlooks the fact that this really is not evidence of the fact at all and therefore cannot be used as corroboration of Karim Bakhsh. We therefore give Mahbub Shah the benefit of the doubt and reverse his conviction and direct that he be released. The appeal of all the others will be dismissed so far as the conviction is concerned. As we have already said, the sentences of Allauddin, Tondi and Bhikhari must be reduced to ten years' transportation. The remaining appellants, whose convictions are upheld and who do not really seem to have been dealt with undue severity, have the good fortune, as Mr. Osborne has pointed out, to profit by the compulsory reduction of the sentences of the undoubted ring-leaders. Inasmuch as Allauddin and Bhikhari certainly deserve severer sentences than the rest, it is only right that the sentences of the remaining five should be reduced. We therefore reduce the sentence of ten years' rigorous imprisonment passed on each of the five appellants, Nabbu Khan, Ghasita, Mohammad Husain alias Manna, Nanhe Khan and Abdul Ghani, to one of seven (7) years' rigorous imprisonment each, including three months' solitary confinement.

V.B./R.K. *Sentences reduced.*

A. I. R. 1919 Allahabad 328

PIGGOTT AND WALSH, JJ.

Darbari Lal—Plaintiff—Applicant.

v.

Roshan Lal—Defendant—Opposite Party.

Civil Ravn. No. 112 of 1918, Decided on 13th March 1919.

(a) **Jurisdiction—Absence of—Burden of proof—Person challenging jurisdiction must prove.**

Where the jurisdiction of a Court is attacked at the hearing, it is not the duty of the Judge to prove to the parties the foundation of his jurisdiction. It is the duty of the party alleging want of jurisdiction to prove his allegation by affidavit or otherwise. [P 329 C 2]

(b) **Civil P. C. (5 of 1908), S. 115—Revision on ground of absence of jurisdiction—Applicant must satisfy Court about it.**

It is the duty of a person when applying in revision, particularly when relying upon want of jurisdiction, to provide himself first with the materials which prove the allegation on which he relies, and to lay them before the Court either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements which are proved by the record. [P 328 C 2]

G. L. Agarwala—for Applicant.

Iqbal Ahmad—for Opposite Party.

Piggott, J.—The question raised by this application is one of jurisdiction. The Court below was asked to consider this point and remarked that the town of Hathras, where the parties reside and where the property in suit is situated, is now, and was on the date of the order under consideration, within the jurisdiction of that Court as Subordinate Judge of Aligarh. If this statement is correct, it is conclusive of the question raised by the application for revision. There is nothing to show that the statement is not correct, and so far as one can gather from such orders as have been issued by this Court, the intention of the Court always was that the work of the Aligarh District should go to the Subordinate Judge and the work of the two districts in the judgeship, namely Etah and Bulandshahar, to the Additional Subordinate Judge. We do not think any case is made out for interference. We dismiss this application.

Walsh, J.—I agree. I only want to add a word or two in consequence of the argument addressed to us. It seems to me that it is the duty of anybody when applying in the revision, particularly when relying upon want of jurisdiction, to provide himself first with the materials which prove the allegations on which he relies, and to lay them before the Court either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements which are proved by the record.

In this particular case the Judge whose jurisdiction was attacked at the hearing

went out of his way to answer the question and to give his reasons, and I cannot believe that in the town of Aligarh, if it be the fact that there is no order justifying this particular Subordinate Judge exercising jurisdiction over parties living in Hathras, there is no one who could not ascertain that fact by a very simple inquiry between May 1918 and March 1919. In fact I should think there is hardly a member of the legal profession who could not discover this, if he pleased, in the course of an afternoon. If we were to agree with the suggestion that the Judge is called upon to prove to the parties the foundation of his own jurisdiction, and because this particular Judge had not placed anything on the record to justify his opinion, that therefore this order was bad, it is obvious that every defeated party who has lost his case before this particular Judge would come up in revision to have his order quashed.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 329 (1)

RICHARDS, C. J. AND RAFIQUE, J.
Umrao Beg—Plaintiff—Appellant.

v.

Mukhtar Beg and others—Defendants—Respondents.

Second Appeal No. 539 of 1917, Decided on 11th February 1919, from decree of Dist. Judge, Agra.

Limitation Act (1908), Art. 10—Sale of fractional shares of zamindari—Physical possession not possible—Suit for pre-emption must be brought within one year from date of registration of deed.

The subject-matter of a sale of fractional shares of a zamindari situate in several khatahs is not capable of being taken physical possession of within the meaning of that expression in Art. 10. A suit therefore to enforce a right of pre-emption in respect of such a sale would be time barred if brought after the expiration of one year from the date of the registration of the sale deed. [P 329 C 1, 2]

M. L. Agarwala—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—This suit was clearly instituted after the expiration of one year from the date when the sale-deed was registered. The subject-matter of the sale were fractional shares of zamindari situate in several different khatahs. Art. 10, Limitation Act, provides that a suit to enforce a right of pre-emption must be brought within one year and the time commences to run from the

time when physical possession of the whole of the property sold is taken, or (where the subject of the sale does not admit of physical possession) when the instrument of sale is registered. In our opinion this property, being of the nature above described, was not capable of being taken physical possession of, within the meaning of that expression in Art. 10, Limitation Act. That being so, the suit was clearly barred by time and the decision of the Court below was correct. We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 329 (2)

TUDBALL, J.

Raj Kumar Das and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 473 of 1918, Decided on 13th August 1918 from an order of the Magistrate, First Class, Gorakhpur.

Criminal P. C. (1898), S. 107 — Magistrate directing accused to furnish security—He has no jurisdiction to alter his order.

Once a Magistrate has directed the furnishing of security in a certain sum by the accused in proceedings under S. 107, the proceedings come to an end and he has no jurisdiction to alter his order. Where one month after passing an order requiring the accused to furnish security in a certain sum to keep the peace, the Magistrate directed the accused to furnish security in a larger sum:

Held: that the order was ultra vires. [P 330 C 1]

Satya Chandra Mukerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—The applicants in this case were, by an order passed on 25th May 1918, bound over by a First Class Magistrate to keep the peace in their own bond for Rs. 100 with two sureties in Rs. 50 each for one year. In default he directed that they should be rigorously imprisoned for one year. About a month later the Magistrate passed another order in which he said he had overlooked the fact that the applicant Raj Kumar Das had been called upon to produce much greater security than the other persons implicated in the case and that he, the Magistrate, had in error only ordered him to provide the same security as the other accused persons. By his subsequent order he therefore purported to correct the error he had made and he ordered Raj Kumar Das to execute a per-

sonal bond for Rs. 1,000 with two sureties of Rs. 250 each. He maintained his first order in respect of the other accused persons, but he was careful enough to correct the error regarding rigorous imprisonment in default of furnishing security. In his subsequent order he directed that the imprisonment should be simple. It is quite clear that the second order passed by the Magistrate is completely ultra vires. He had finished with the case on 20th May 1918 and it was beyond his powers to alter his order. The second order must therefore be set aside. In so far as the first order is concerned, I can see no reason to interfere with it except in respect of that portion which directs the accused persons to be rigorously imprisoned in default of furnishing security. It is clearly contrary to law and I therefore modify that order to this extent: that if the security demanded be not furnished, the imprisonment to be suffered will be simple imprisonment. It is unnecessary to interfere in any other way with this order.

V.B./R.K.

*Order modified.***A. I. R. 1919 Allahabad 330**

RYVES, J.

Manghai Ram—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 487 of 1919, Decided on 12th September 1919, against the order of Sess. Judge, Allahabad, D/- 22nd June 1919.

Penal Code (1860), S. 228—Absence of intention to insult Court—Scuffle by accused in Court verandah does not constitute offence under S. 228.

Accused had a scuffle with some person in the verandah of a Court room. The chaprasi of the Court intervened and put an end to it. No interruption was caused to the Court and it was found that there was no intention on the part of the accused to insult the Court:

Held: that the accused was not guilty of an offence under S. 228. [P 330 C 2]

K. R. Dang—for Applicant.*Asst. Govt. Advocate*—for the Crown.

Judgment.—In this case there is a discrepancy between the finding of the learned Sessions Judge and of the Magistrate as to the facts. I have examined the record and there is no doubt that the Magistrate has come to the right conclusion on the facts. Manghai Ram, who was a witness for the prosecution in a case which was then being heard before the Magistrate, tried to come into the Court

room from the verandah. Shanker, who appears to have been in some way related to the accused in that case, prevented him. There was a scuffle between the two and some sort of an assault. Mahabir, who was a chaprasi of the Court, intervened and told Manghai not to come inside the Court-room. When this happened, the Court appears to have taken action under S. 480, Criminal P. C., and on the facts found, namely, that there had been this assault in the verandah of the Court room, convicted Manghai Ram under S. 228, I. P. C., holding that this conduct amounted to "a contempt of Court as defined in that section," and sentenced him to pay a fine of Rs. 50. Manghai applied in revision to the learned Sessions Judge, who rejected the revision on what seems to me a misconception of the actual facts. The Judge seems to have been of the opinion that Manghai struck the chaprasi and held that it was the duty of the chaprasi, who was acting as a servant of the Court, to prevent a witness from coming into the Court-room before he was called, and went on to hold that the accused in striking the chaprasi undoubtedly intentionally insulted the Court. As a matter of fact it was never suggested by anybody that the accused had struck the chaprasi. On the facts found it seems to me that the conviction cannot be sustained. There is no mention in S. 228 of "contempt of Court." It is quite obvious that Manghai, when he slapped Shanker in the verandah of the Court because Shanker prevented him from going inside the Court-room had no idea whatever of intentionally insulting the learned Magistrate. He cannot therefore be convicted of intentional insult. He might however be convicted if it was proved that he had caused an interruption to the Magistrate. There is nothing whatever on the record to show that he did so. There is no note made by the Magistrate at the time, no evidence, and nothing is said in the judgment on the point. It seems to me therefore, that the conviction must be quashed. I therefore set it aside, acquit the accused, and direct that the fine, if paid, be refunded.

V.B./R.K.

Conviction quashed.

A. I. R. 1919 Allahabad 331 (1)

RICHARDS, C. J. AND RAFIQUE J.

Mt. Barfi—Plaintiff—Appellant.

v.

Kishorilal and others—Defendants—Respondents.

Misc. Privy Council Appeal No. 20 of 1918, Decided on 15th February 1919, for leave to appeal to Privy Council.

Civil P. C. (1908), Ss. 109 (a) and 149—Appeal to His Majesty in Council—Order rejecting application to extend time for paying in court-fees is not final order.

The applicant filed a memorandum of appeal along with an application for leave to appeal in forma pauperis. The Court rejected the application. By this time the appeal had become barred by time. The applicant then applied for permission to deposit the necessary court-fees. This application was also rejected. He then applied for leave to appeal to His Majesty in Council from the latter order:

Held : that the order refusing to allow the fees to be paid was not a final order passed on appeal within the meaning of S. 109 (a) and was not appealable to His Majesty in Council.

[P 331 C 2]

Girdhari Lal Agarwala—for Applicant.

Judgment.—This is an application for leave to appeal to His Majesty in Council. It appears that the applicant filed a memorandum of appeal in this Court against the decision of the District Judge. At the same time the applicant made an application that she might be allowed to appeal in forma pauperis. A Bench of this Court heard that application and by an order, dated 2nd April 1918, rejected the application upon the ground that the decree appealed against had not been shown to be contrary to law or erroneous or unjust. Thereupon the applicant made a fresh application that notwithstanding limitation she might be at liberty to deposit the necessary court-fees, so that the appeal might be tried in the ordinary way. The appeal at this time was of course long beyond time. This Court rejected this application also. S. 149, Civil P. C., provides that where the court-fees have not been paid, the Court may at its discretion allow the person by whom the fee is payable to pay it and upon such payment the documents would have the same force and effect as if the fee had been paid in the first instance. It is quite clear that the appeal could not proceed, or be admitted, unless the Court had allowed the application to pay the fee notwithstanding the lapse of time. This Court in exercise of its discretion

rejected the application. It is from this order that the applicant now seeks to obtain leave to appeal. Appeals to His Majesty are prescribed by S. 109, Civil P. C., and it is there provided that an appeal shall lie to His Majesty in Council: (a) from any decree or final order passed on appeal by a High Court; (b) from any decree or final order passed by a High Court in exercise of original and civil jurisdiction; and (c) from any decree or order when the case as hereinafter provided is certified to be a fit one for appeal to His Majesty in Council.

It is contended on behalf of the applicant that the order of this Court refusing to allow the fees to be paid is a final order passed on appeal by this Court within the meaning of Cl. (a). We think that it is clearly not such an order. It was not an order passed on the appeal. The appeal had never been admitted. It was simply an application made to this Court for the first time asking for leave to deposit a court-fee. We reject the application with costs.

V.B./R.K. *Application rejected.*

A. I. R. 1919 Allahabad 331 (2)

WALSH AND PIGGOTT, JJ.

Nathu and others—Defendants—Appellants.

v.

Ghansham Singh—Plaintiff—Respondent.

Second Appeal No. 286 of 1917, Decided on 14th December 1918, from decree of Addl. Sub-Judge, Saharanpur.

(a) Limitation Act (1908), Art. 132—Malikana is charge on immovable property—But it must be claimed as charge on such property.

Under the explanation to Art. 132, Sch 1, Limitation Act, a claim to a malikana allowance must be deemed for the purposes of limitation to be a claim for money charged upon immovable property within the meaning of the said article.

[P 334 C 1]

This principle is subject to the proviso that the plaintiff coming into Court to claim such malikana allowance must claim it as a charge upon the immovable property concerned. [P 334 C 1]

(b) U. P. Land Revenue Act (1901), S. 74—Proprietor excluded from settlement—Settlement with new proprietor subject to malikana to be paid to excluded proprietor—New proprietor having accepted settlement on understanding that they are liable to pay malikana cannot plead that he is not liable to pay it.

The proprietors of a village having refused to accept a settlement the Government settled the village with the actual cultivators subject to a malikana charge of 12 1/2 per cent. on the land

revenue payable to old proprietors who had been excluded from settlement. There were new settlements of the village in 1867 and in 1890, and at each of these settlements the right of the descendants of the original proprietors to receive a malikana allowance at 12 1/2 per cent. on the land revenue was recognized in the *wajibularz*. In a suit by one of the descendants of the old proprietors to recover his share of the malikana:

Held: that the new proprietors having accepted the settlements of 1867 and 1890 on the understanding that they became liable from the date of each of those settlements to pay a certain sum annually to Government plus 12 1/2 per cent. on the same to the old proprietors were now estopped from pleading that they were not liable to pay the malikana. [P 333 C 2]

Kailas Nath Katju—for Appellant.

Peary Lal Banerji—for Respondent.

Judgment.—This is a second appeal by some of the defendants out of a very large number against whom a decree purporting to be one to enforce a malikana charge or allowance, payable by the defendants generally as cosharers in a certain mahal in the village of Dundheri Khawajipur, has been passed by both the Courts below. The established facts are that in the year 1838, the former proprietors of this village, who were Rajputs by caste, refused to accept the settlement of the village offered to them under the orders of Government; they were therefore excluded from settlement and a settlement was offered to the cultivators of the village generally, whose successors-in-interest are the defendants in this suit. At the same time Government proceeding on the principle now recognised by S. 74, United Provinces Land Revenue Act, (Local Act 3 of 1901), prescribed a malikana charge of 12 1/2 per cent. on the land revenue as payable by the new proprietary body to the old proprietors who had been excluded from settlement. There were new settlements of the village in the year 1867 and in the year 1890.

At each of these settlements the right of certain persons, the descendants of the original proprietors prior to the year 1838, to receive a malikana allowance at 12 1/2 per cent. on the land revenue was recognized in the *wajibularz*. It is also proved that, as part of the record of proprietary rights in the village prepared at each of these settlements, a *khewat malikana* has been drawn up in which the names of the persons entitled to a share in the malikana and the sum payable to each of them or to each group as therein specified are duly recorded.

It is not contested that according to this *khewat malikana*, the plaintiff Ghansham Singh is entitled to receive an allowance as stated by him in the plaint and we have not been asked to reconsider the claim in the plaint to the effect that arrears of this charge for a period of 11 years prior to the institution of the suit would amount to Rs. 462-5-6. The Courts below have allowed simple interest at 12 per cent. per annum on the amount falling due each year and have thereby raised the total claim to Rs. 778-5-3. The decree passed by the Court of first instance and affirmed on appeal is a simple money-decree for this amount with future interest against the whole body of defendants jointly. The appeal before us is by some of the defendants only. It will obviously be necessary for us to reconsider the entire case on the appeal of these defendants and the amended decree which we propose to pass will affect equally those defendants who have not appealed along with the appellants before us. A number of pleas have been taken in the memorandum of appeal raising points which have been dealt with more or less explicitly in the Courts below but there has been no express plea against the order of the Courts below allowing interest. For reasons which we hope to make sufficiently apparent we have allowed this point to be argued although it was not taken in the memorandum of appeal. The omission therefore of the appellants to enter a formal plea in this Court on this point will only affect our order as to the costs of the appeal.

The first point taken by the appellants would seem to be most capable of accurate statement in the form of an alternative. It is contended that the malikana allowance granted in the year 1838 should be regarded as merely a grant for the period of the settlement then current; along with that it is contended that the evidence on the record as to what was done at the settlements of 1867 and of 1890 does not amount to evidence of a renewal of the malikana for the period of the said settlements. As a sort of alternative to the above it is pleaded that, if the grant made in the year 1838 was a grant in perpetuity, then the rights of the grantees had become extinguished long before the institution of this suit by operation of the Statute of Limitation. The contention on this point is based on the fact

that in the Indian Limitation Act of 1859 there was no provision analogous to that introduced into subsequent Statutes of Limitation, from the year 1871 onwards, which is now to be found in the explanation appended to Art. 132, Sch. 1, Act 9 of 1908. Prior to the passing of the Limitation Act of 1871 a claim to a malikana such as that set up in the present suit was treated as a claim to immovable property, and it was held that in the event of such claim not being enforced within a period of 12 years the right became entirely barred.

The Courts below have in substance disposed of these alternative pleas together, upon a view which they have taken of the effect of proceedings at the settlements of 1867 and of 1890. One of the contentions before us has been that it does not really matter what was done at those settlements, because in any case the Settlement Officer had no right to fix a malikana allowance in favour of persons not entitled to receive the same. Reference is made to the provisions of S. 74 of the present Land Revenue Act, and it is pointed out that the right to receive an annual allowance in the form of a percentage on the revenue assessed is only conferred upon a proprietor who is excluded from the settlement at which the allowance is fixed under the provisions of the section. As a matter of fact the question of the position of an excluded proprietor who has once received a malikana allowance under the provisions of this section, or under any analogous provisions of law previously in force, with regard to subsequent settlements is not dealt with directly, either by S. 74, or by any other section of the Land Revenue Act. What the Settlement Officer has to do at the beginning of each new settlement is to ascertain the existing proprietary rights in land: if he finds that there is in existence a right to receive a malikana charge, and is of opinion that it has not come to an end with the conclusion of the settlement at the commencement of which it was fixed, he is obviously under an obligation to recognize that right in the papers drawn up by him for the purposes of the new settlement and to take into consideration the existence of the said right in framing his assessment proposals for the Mahal concerned.

The question really raised by the argu-

ment before us is not so much one of law as of the sufficiency of the evidence on this record and the inferences fairly to be drawn from such documents as the *wajibularz* and the *khewat malikana* which have been put in evidence for the settlements of 1867 and 1890. It is not denied that, if at either of these settlements Government fixed a certain revenue demand on this Mahal and offered to settle it with the proprietary body, subject to the payment of that demand plus a malikana charge of twelve and a half per cent. in favour of the descendants of the proprietors who had been excluded in the year 1838, it was within the competence of the Local Government to do this. If furthermore the proprietary body accepted the settlements of 1867 and 1890, on the understanding that they became liable from the date of each of the aforesaid settlements to pay a certain sum annually to Government, plus twelve and a half per cent on the same to other persons, then the proprietors represented by the defendants in the present suit are and remain subject to that liability. What has really been argued before us is that the papers on this record do not warrant an inference to the effect stated above. The argument is an ingenious one, but does not appear to be of real force. The terms of the *wajibularz*, when considered in connexion with the *khewat malikana* prepared at each of the settlements, do seem to bear out the conclusion of fact above stated. It has to be remembered moreover that we are dealing with this matter now in second appeal, and that the decision of the Courts below does very distinctly proceed upon the basis that the evidence on the record proves that at each of the settlements of 1867 and of 1890, the proprietary body which accepted each of those settlements accepted it subject to the condition that they would also be liable to pay the malikana charge in question.

For the purpose of this appeal therefore it is quite sufficient for us to say that there is on the record documentary evidence sufficient to entitle the Courts below to arrive at the above conclusion. In any view of the case the Courts below are right in the decision they have come to, which is to the effect that the right to receive this charge is an existing right, that it was in existence when the Limi-

tation Act, 1871 came into force and has been in existence ever since under the limitation law as amended in subsequent statutes. The next question raised, and one of greater difficulty, is whether the plaintiff is entitled to claim this charge or allowance for a period of 11 years antecedent to the date of the institution of the suit, or is limited to a claim for a personal decree against the defendants for a period of three years only. Under the explanation to Art. 132 Sch. 1, Lim. Act, already referred to, a claim to a malikana allowance must be deemed, for the purposes of limitation, to be a claim for money charged upon immovable property within the meaning of the said article. This principle has been affirmed in more than one decision of this Court, the case most nearly in point being that of *Shaida Ali v. Phullo* (1). No doubt this principle is subject to the proviso that the plaintiff coming into Court to claim such malikana allowance must claim it as a charge upon the immovable property concerned. This principle clearly follows from the decision of their Lordships of the Privy Council with regard to mortgage suits in the reported case of *Ram Din v. Kalka Prasad* (2). The present case is complicated by two circumstances: one is that the plaint as originally drafted was against the lambardars of the village only and claimed nothing more than a simple money decree. The plaint was afterwards amended under the orders of the Court, with a view to impleading as defendants the entire body of cosharers in the mahal in suit and to claiming a charge on the property in question and relief by way of an order for sale of the same.

On the other hand the Court of first instance, although in the operative portion of its judgment it has written that the suit "is decreed with costs," and by this presumably means that the claim preferred in the plaint as amended under the orders of the Court is decreed, has nevertheless passed what is on the face of it a simple money decree against all the defendants, which does not contain any direction for the sale of the property subject to the charge. Arguments before us have been directed, firstly, to

the insufficiency of the amendments made under the orders of the Court to change the essential nature of the plaint as originally drafted, and secondly, to the effect on the parties of the fact that both of them have acquiesced in a simple money decree. The plaintiff has never up to this point objected to the fact that the decree as passed by the Court of first instance, and affirmed in first appeal, does not give him relief by way of an order for sale, and on the other hand the defendants have appealed against the decree as a whole, but had no particular reason for taking the point that the decree as passed was inconsistent with the operative portion of the judgment. In this connexion our attention has been drawn to the fact that in the case of *Shaida Ali v. Phullo* (1), already referred to, a Bench of this Court had also to deal with a simple money decree in a suit to enforce a malikana charge, in which relief had been asked for by way of an order for sale. The fact seems to be that in that case no one thought it worth while to ask the Court to alter the form of the decree and the learned Judges simply confined themselves to the question of limitation. We think that, as the case has now been argued out before us, and in view of the application orally made to us on behalf of the plaintiff-respondent, to the effect that the decree of the Court of first instance should in any event be brought into conformity with the operative portion of the judgment, it is not merely open to us, but is incumbent upon us, to deal with the entire matter and to pass whatever decree in the case we think the Court of first instance ought to have passed.

We consider however that in taking this view we are making a certain concession to the respondent and that, as we have done this, it is not fairly open to the respondent to object to our allowing the appellants to argue the point as to interest which was not expressly taken in this memorandum of appeal. We are very definitely of opinion that there is no reason, either in law or in equity, for allowing the plaintiff interest upon this claim. The reasoning of the Court below on this point, which was taken into consideration in the judgment, is only applicable to those cases in which liability to pay interest is one of the express stipulations of a contract between the parties.

(1) [1913] 35 All. 185=19 I. C. 63

(2) [1885] 7 All. 502=12 I. A. 12=4 Sar. 619 (P.C.)

The liability of the defendants to pay this malikana allowance was one which accrued due every year, and there seems no reason whatever why the plaintiff should be allowed to keep his claim in abeyance for a period of 11 or 12 years and then expect to be paid interest at a substantial rate on all the arrears. There is one other point which we ought not to pass over without notice. It has been contended on behalf of the appellants that if this Court is prepared to treat the plaintiff's claim as one for the enforcement of a charge, which it certainly was after the plaint had been amended, the question ought further to be considered whether the plaintiff alone is entitled to sue, without any of the other persons entitled to the enjoyment of the malikana allowance appearing on the record either as plaintiffs or defendants.

We think that under the khewat malikana drawn up at the last settlement the right to receive this allowance was split up, and that the plaintiff alone is entitled to maintain this suit for the share recorded as due to him in that document. To hold otherwise would mean that the proprietors liable to pay this charge might evade their liability owing to the difficulty of its enforcement, if it were held that the only possible suit for that purpose would be one jointly brought by all the proprietors specified in the khewat malikana. There is one more point which is one of detail only, but which must not be altogether passed over. Appellants Nos. 5 to 8, namely Chettan Das, Bhikhu Mal, Jagdish Saran and Bisheshar Dayal, pleaded that they were not cosharers in the Mahal in suit; that their rights in this village were limited to the actual possession of certain grove-lands not assessed to revenue; and that they were consequently not liable to contribute anything towards the malikana allowance charged on the revenue. On this state of pleadings we think it was for the plaintiff to prove, as against these defendants, that they were subject to the liability claimed, and that he has not done so. The suit against them ought to be altogether dismissed. The result is that we set aside the decree of the lower appellate Court and alter the decree of the Court of first instance as follows: The suit is dismissed altogether as against the defendants Chettan Das,

and Bhikhu Mal and Jagdish Saran and Bisheshar Dayal, sons of Sagun Chand. The sum decreed is reduced from Rupees 778-5-3 to Rs. 462-5-6, on which simple interest will be allowed at 6 per cent, per annum from today's date.

We fix a period of six months from today within which this sum is to be paid by those defendants against whom the decree remains good, with a direction that, in the event of their failure to pay within the stipulated period, the proprietary rights in the mahal in suit as specified at the foot of the plaint shall be brought to sale. We add to the decree a declaration that, out of the sum of Rupees 462-5-6 three-elevenths, being the malikana allowance for three years prior to the institution of the suit, is enforceable as a personal liability against the defendants jointly, in the event of the whole money not being realized by the sale of the mortgaged property; but that the balance, that is to say, eight-elevenths of the sum decreed, is not recoverable as a personal liability from any of the defendants. This appeal has succeeded only upon a point not taken in the memorandum of appeal which was argued by permission of the Court. We therefore think that the appellants (other than Chettan Das, Bhikhu Mal, Jagdish Saran and Bisheshar Dayal) must pay the costs of the appeal. The defendants named above, against whom the suit has been dismissed, are entitled to their costs throughout, if they can show that they have incurred separate costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 335

BANERJI AND PIGGOTT, JJ.

Ali Hussain—Defendant—Appellant.

v.

Mohamed Hussain — Plaintiff — Respondent.

First Appeal No. 38 of 1919, Decided on 30th July 1919, from order of Sub-Judge, Moradabad, D/- 29th January 1919.

(a) **Mahomedan Law—Wakf—Muttawali—Power—Muttawali appointing another without authority remains responsible and can sue to restrain his nominee.**

Where the muttawali of wakf property appoints another muttawali, his responsibility remains unimpaired, unless such appointment or the transfer of the trust is confirmed by authority. Being so responsible, he is entitled to restrain his co-trustee from alienating or wasting any part of the wakf property.

[P 336 C 2]

(b) Civil P. C. (5 of 1908), S. 92—S. 92 does not apply to suit for declaration that plaintiff and defendant are muttawalis and entitled to management.

Section 92 has no application to a suit for a declaration that the plaintiff and defendant are the muttawalis of wakf property and are entitled to manage it jointly. [P 236 C 2]

S. Raza Ali—for Appellant.

S. M. Sulaiman—for Respondent.

Judgment.—The suit out of which this appeal arises relates to a grove which originally belonged to one Mt. Muniran. She made a wakf of this grove in the year 1890 and appointed herself the first muttawali. The deed of wakf provided that after her death the muttawalis should be her grandsons, namely, the plaintiff Muhammad Husain and the defendant Ali Husain. The present suit was brought by the plaintiff for a declaration that the grove was wakf property in which the plaintiff and the defendant Ali Husain had no other rights than those of muttawalis. He asked for an injunction restraining Ali Husain from transferring the trees in the grove. He was allowed to amend the plaint and to claim a certain sum of money as the price of trees which were alleged to have been cut down. It appears that on 15th June 1917 the plaintiff Muhammad Husain executed a document whereby he transferred his rights as muttawali to his father Allah Baksh and appointed him muttawali in his own place. Allah Baksh applied for mutation of names, but his application was refused and he has taken no part in the management of the property nor has he asserted any right in respect of it. The defendant contended that as the plaintiff had transferred his rights to his father he was not entitled to maintain the suit and that he had ceased to be muttawali. The decision of the question thus raised depended on the terms of the wakfnama executed by the creator of the wakf. In para. 4 of that document she provided that the muttawalis could appoint a member of her family as muttawali in their own place. The learned Subordinate Judge held that this was not a general power enabling each one of the muttawalis to appoint a substitute in his own place but power was given to both the muttawalis jointly to appoint a substitute in place of both of them. We think that this interpretation of the clause in the wakfnama is a proper interpretation and

apparently represents the intention of the wakif. If this was so (and we think that this is what was intended by the wakf), the appointment of the plaintiff's father by the plaintiff was invalid. As we have said above, the appointment has never taken effect and the plaintiff's father has after the decision of the mutation case not asserted any right under the document executed in his favour. It is urged before us that the effect of the appointment of the plaintiff's father by the plaintiff was that the plaintiff relinquished his rights as muttawali, and in support of this contention reliance is placed upon the following passage in Mr. Ameer Ali's *Mahomedan Law*, Vol. 1, Edn. 4, p. 456:

"The appointment of another muttawali by one who does not possess general powers, without the leave of the Qazi, is tantamount to a withdrawal of the incumbent from office, yet he remains responsible, unless the appointment or transfer of the trust is subsequently confirmed by the Qazi."

This passage, in our opinion, so far from supporting the case of the appellant, is against him. The plaintiff, notwithstanding the appointment by him of his father, remained responsible inasmuch as the appointment of the father or the transfer of the trust was never confirmed by any authority. Being so responsible he is entitled to restrain the defendant, his co-trustee, from alienating or wasting any part of the wakf property. A reference was made in the course of the argument to S. 92, Civil P. C. and it was urged, though no plea has been taken on the point in the memorandum of appeal before us, that the plaintiff was seeking by this suit to obtain the remedy which could be granted by S. 92. It is clear from the prayer in the plaint that such was not the intention of the plaintiff. He was not seeking to remove the defendant from the management of the trust property. On the contrary he is asking for a declaration that both he and the defendant are the muttawalis and are entitled to manage the wakf property jointly. We think the appeal is without force. We dismiss it with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 337

PIGGOTT AND WALSH, JJ.

Kashi Prasad — Decree-holder — Appellant.

v.

Union Bank of India Ltd. Delhi—Decree-holders—Respondents.

Execution Second Appeal No. 1403 of 1917, Decided on 18th February 1919 from decision of Dist. Judge, Bareilly, D - 31st July 1917.

(a) Civil P. C. (1908), S. 47—Decree obtained against company—It subsequently going in liquidation—Transfer of decree—Application by transferee for substitution is to be made to execution Court—Companies Act (1913), S. 171.

An application by a transferee of a decree, obtained against a company which has since gone into liquidation, for substitution of his name as decree-holder, under S. 47 (3), Civil P. C., must in spite of the provisions of S. 171, Companies Act, be made to the execution Court, and not to the winding-up Court. [P 337 C 2]

(b) Companies Act (1913), S. 171—Leave to bring suit once given covers all subsidiary legal proceedings.

Leave under S. 171 to bring a suit means leave by the winding up Court and when once given, must be taken to cover all subsidiary legal proceedings necessarily arising out of the suit. [P 338 C 1]

U. S. Bajpai—for Appellant.*Gulzari Lal*—for Respondents.

Judgment.—This is an application, dated 24th April 1917, by an alleged transferee of a decree, to have his name substituted as decree-holder of the decree which was dated 3rd December 1915. The application was made to the execution Court in which the decree had been obtained and was obviously based upon S. 47, sub-S. (3), Civil P. C., asking that Court to determine whether the applicant was, or was not, the representative of the decree-holder. Of course the applicant could not execute the decree without getting his name upon the record in that capacity, and to that extent the application was a perfectly proper one. The judgment-debtor was a company in liquidation. The liquidation was voluntary and was going on while the suit was pending. Subsequently however to the decree somehow or another a petition was presented to the winding-up Court, which is in another province, and an official liquidator was appointed on 10th April 1917. It looks as though an order for the compulsory winding up of the company had been made. That being so S. 171 was brought into operation; in other words, no suit or other legal proceeding could be

proceeded with or commenced against the company except by the leave of the winding-up Court and on such terms as such winding-up Court should direct.

In spite of that section we think the application was well-founded. The applicant is only an alleged creditor. He is not the original party to the suit. He was not, at the time of the application, on the record. His capacity as decree-holder by transfer might be disputed by the liquidator in the liquidation and if the applicant had applied to the winding-up Court to admit his debt in his capacity of decree-holder, he might have been told by the winding-up Court that he must first put his tackle in order by applying to the execution Court under S. 47 (3). Having occasion to adjudicate on winding-up matters I am inclined to think that I should have taken that view, in other words, I should have thought that in entertaining an application for admission of a debt based upon a decree by an applicant who was not on the record, I was usurping the function of the execution Court under S. 47. At any rate we think the applicant would have run considerable risk of being met by this objection unless he had first applied to the execution Court.

Both Courts have fallen into an error which is not uncommon, and which ought to be removed as quickly as possible: I myself have had to correct it on more than one occasion. The suit was brought against the company, the original debtor. The fact that the company is in liquidation does not change the party, but only its legal character and description. It continues to be the company, but in liquidation. The liquidator is only an officer of the Court, like an Official Receiver, vested with the assets and management of the company during the liquidation. He does not become a party unless he is sued in his personal capacity for something in respect of which he has made himself personally liable. We think that the application ought to be granted and that we ought to confirm the order made by the first Court. In order to make the matter clear we would add a few observations. When the applicant gets on the record as representative of the decree-holder he will be then in a position to make his claim, for what it is worth, before the winding-up Court; that is to say, if the liquidator

rejects it, he will be able to apply to the Court to overrule the liquidator and to admit it. This Court is in another province altogether. So far as the Courts subordinate to this High Court are concerned, we would merely point out that leave under S. 171 to bring a suit means leave by the winding-up Court, and when once given must be taken over all subsidiary legal proceedings necessarily arising out of the suit. When it comes to a question of attachment, distress or execution, S. 232, Companies Act shows clearly that the hands of the Court in which the decree is obtained or in which execution proceedings must be taken, are tied. Any order is void which is not made with the leave of the winding-up Court. That Court has the duty of seeing that the assets of the company are distributed rateably amongst the creditors according to law. It is not bound even by decrees of other Courts. It can go behind decrees, or transfers of decrees, and decide for itself whether there is a debt, and what is the amount of it, which ought to be admitted to proof. Presumably it will only allow, if at all, execution by any single creditor against the assets of a company in liquidation, in its discretion upon the principles upon which English winding-up Courts have occasionally allowed execution but as will appear from the decided cases those occasions are very rare.

The order of the Court below will therefore be set aside, the appeal is allowed and the order of the first Court restored with costs. So far as we are concerned we must order the costs to be recovered against the official liquidator personally. Whether he eventually gets them out of the assets of the company must depend on the view which the winding-up Court takes of his decision to fight the application.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 338

PIGGOTT AND WALSH, JJ.

Sita Ram—Appellant.

v.

Dulam Kuar—Respondent.

Execution Second Appeal No. 1140 of 1917, Decided on 10th December 1918, from decree of Sub-Judge, Jaunpur.

Hindu Law—Succession—Daughters in possession of father's estate—Payment by one of them out of income to save property—Death

after obtaining decree for amount so paid—Natural heirs of deceased sister are entitled to succeed and not surviving sister.

Two Hindu sisters, *T* and *D* were in possession of their father's estate. While they were thus in possession *T* made a payment out of the income of the estate to save certain property from being sold up on account of arrears of Government revenue due from the sons of *D*. Subsequently she obtained a decree for the sum paid by her against the sons of *D*, but died before the decree could be realised. *D* claimed to execute the decree on the ground that it was part of the estate which she had held jointly with *T* and which had devolved upon her by survivorship:

Held: that the debt in respect of which the decree was passed was not one of the assets of the estate of which *T* and *D* were joint owners but was separate property, not necessarily stridhan, of *T* and that her legal representatives in respect of the decree were her natural heirs under the Hindu law and not *D*. [P 339 C 2]

S. M. Sulaiman—for Appellants.

Gokul Prasad—for Respondents.

Judgment.—The essential facts governing the decision of this appeal may be stated as follows: Two sisters, *Tulsha Kuar* and *Dulam Kuar*, had succeeded to the possession of their father's estate. They held the same, of course, with the limited estate of Hindu women, and subject to a right of survivorship as between themselves. While they were in possession *Mt. Tulsha Kuar* made a certain payment out of the income of the estate in her hands, the object of this payment being to save certain property from being sold up on account of arrears of Government revenue due from her nephews, the sons of *Mt. Dulam Kuar*, and from certain cousins of the said nephews. The payment so made by her she was entitled to recover from the persons for whose benefit she made it. She brought a suit with that object and obtained a decree. It would seem that she also took out execution of that decree on one or more occasions before her death, but she died while the decree was still unsatisfied. The question now is, who is entitled to realise this money as the legal representative of the deceased decree-holder? In one sense the proceedings actually taken, which have been upheld as valid by the lower appellate Court, are almost farcical; *Mt. Dulam Kuar*, the mother of some of the judgment-debtors, claims the money due under this decree as one of the assets of the estate which belonged to herself and to *Tulsha Kuar* jointly, and which has devolved upon her by survivorship, and takes proceedings to realize it through

the agency of one of her sons, who is himself a judgment-debtor. She is taking out execution of this decree as against the cousins who were joint judgment-debtors. The Court of first instance held, in a carefully written judgment, that the decree in question was not part of the assets of the estate to which Dulam Kuar had succeeded as the daughters of their father.

The learned Munsif found that, if any one was entitled to execute this decree, it would be the personal heirs of Mt. Tulsha Kuar, that is to say, some member of this lady's husband's family. The learned Subordinate Judge has reversed this decision upon what seems to us a highly technical view of the position. He lays stress on the fact that it was admitted that Mt. Tulsha Kuar had no independent source of income outside of her share in the estate of her late father in the enjoyment of which she was living; consequently the money which she paid to Government for the benefit of the defaulting cosharers must have come out of the income of the estate in her hands. Hence the learned Subordinate Judge holds that the debt due to Mt. Tulsha Kuar under the decree amounts to a saving out of the estate of her father, and he relies upon the principle laid down by their Lordships of the Privy Council in *Isri Dutt Koer v. Hansbutti Koerain* (1) that a widow's savings from her husband's estate are not her stridhan if she has made no attempt to dispose of them in her life-time, they follow the estate from which they arose. The real difficulty in the way of accepting this view is that the judgment debt in favour of Mt. Tulsha Kuar was not a saving. She had applied a portion of the income of the estate in her hands, over which she admittedly had full power of disposal, to meet a certain emergency and by reason of the use which she had made of it, there was a debt due to her at the time of her death. The real question is, who is entitled to collect this debt? The efforts of Mt. Tulsha Kuar to realize it, specially when it is considered that the sons of Mt. Dulam Kuar were among the judgment-debtors against whom she took out execution, suggest the inference that she wanted this money back for herself,

in order to spend it as she might think proper.

There was no necessity for her to take out execution of the decree at all, if she had been under the impression that she was doing so for the benefit of the estate of which she herself and Mt. Dulam Kuar were the joint owners. Under the circumstances of this case we think that the right to realize this debt was not one of the assets of the estate of which Dulam Kuar and Tulsha Kuar were joint owners, but was personal property (not necessarily stridhan) of Mt. Tulsha Kuar, and that her legal representatives in respect of this debt are to be sought amongst her natural heirs under the Hindu law, that is to say, in the family of her husband. Her sister Mt. Dulam Kuar is not, in the strict sense of the word, her heir at all. Her claim to realise this debt is based upon her right of succession by survivorship to a particular estate of which she became the joint owner, along with her sister Tulsha Kuar upon the death of their own father. It is not really a question of whether this decree was or was not the stridhan of Mt. Tulsha Kuar, but whether it did or did not form part of the assets of the estate of which Tulsha Kuar and Dulam Kuar were the joint owners? For the reasons stated we think that it did not, and that the decision of the Court of first instance was correct and ought to be restored. We allow the appeal, set aside the order and decree of the lower appellate Court and restore that of the Court of first instance with costs throughout.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 339

BANERJI, J.

Gajadhar Das—Petitioner

v.

Ram Sumiran Dube—Opposite Party.

Civil Revn. No. 52 of 1919, Decided on 17th July 1919, from order of Dist. Judge, Benares, D/- 2nd August 1918.

Civil P. C (5 of 1908), O. 21, R. 89—Actual deposit delayed by order of Court and not through any fault of party—Sale can be set aside.

The property of a judgment-debtor was sold by auction on 20th March. On 20th April he applied to the sale officer to set aside the sale and offered to deposit the decretal amount and the penalty mentioned in R. 89, O. 21, Civil P. C.

The sale officer, not being competent to entertain the application, forwarded it on 22nd April to the Court which had ordered the sale. On

(1) [1884] 10 Cal. 324=10 I. A. 150=4 Sar. 459 (P. C.).

23rd April the judgment-debtor applied to the Court asking that the money might be received. The Court did not receive the money and ordered the matter to come before it on 30th April. The money was deposited on 1st May, but the Court refused to set aside the sale on the ground that the deposit had not been made within thirty days of the sale. This order was reversed by the appellate Court and the High Court was moved in revision, it being contended that the appellate Court had no jurisdiction to make the order it did as no deposit had been made within thirty days.

Held: that the actual delay in the deposit of the money was not due to any act on the part of the judgment-debtor, and that although the deposit was actually made on 1st May, he had brought the money into Court on 20th April, and that the appellate Court was therefore, justified in setting aside the sale. [P 340 C 2]

Jang Bahadur Lal—for Petitioner.

M. L. Agarwala—for Opposite Party.

Judgment.— This is an application for revision and has been brought under the following circumstances. The property of the respondent judgment-debtor was sold by auction on the 20th of March 1918. The sale was held by the Revenue Court as sale officer under the orders of the Civil Court. On the 20th of April 1918, the judgment-debtor filed an application before the sale officer offering to deposit the decretal amount and the penalty mentioned in O. 21, R. 89, Civil P. C., and prayed that the sale might be set aside. The sale officer was not competent to entertain the application and accordingly made an order that the application be forwarded to the Munsif's Court which had ordered the sale. As a matter of fact the application was not actually sent to the Munsif's Court until 22nd of April 1918. On 23rd of April 1918 the judgment-debtor filed an application in the Munsif's Court, in which he referred to the application presented by him on 20th of April 1918 and stated that he had brought all the money that was required to be deposited and prayed that it should be received. The Munsif did not receive the money but passed an order to the effect that the case should be put up on 30th April 1918. He said in his order that "so far the money had not been deposited." It is clear that had the Court received the money, it would have been deposited as the judgment-debtor distinctly said in his application that he had the money ready and he asked the Court in clear terms to receive it. On 1st of May, 1918 the money was actually deposited. The

Court of first instance refused to set aside the sale, on the ground that the deposit had not been made within thirty days of the sale. This order of the Court of first instance has been reversed by the lower appellate Court. The contention in this application is that the order of the lower appellate Court was without jurisdiction as no deposit had been made within thirty days. In my opinion the application is untenable. As has been already stated, the judgment-debtor had on 20th April 1918, stated to the sale officer before whom he by an error put in his application of that date that he had the money ready for deposit and he asked that it should be deposited. Had the application been forwarded to the Munsif's Court on the same date as directed by the sale officer, the deposit would have been made on that date, the judgment-debtor having been ready to make the deposit on that date. On the 23rd April also he stated that he had the money with him, that he was ready to deposit it and he asked the Court to receive the money. The Court, however did not do so. Therefore the delay in the actual deposit of the money was not due to any act on the part of the judgment-debtor. He brought the money on 20th April and was ready to deposit it if the Court had received it. Therefore it must be held that although the deposit was actually made on 1st May, he had brought it into Court on 20th April. Under these circumstances the lower appellate Court was justified in setting aside the sale. I see no reason to interfere. Furthermore an order in revision is a matter in the discretion of the Court and having regard to the circumstances of this case and to the fact that no injustice has been done, I see no reason to exercise my discretion in favour of the applicant. I accordingly reject the application. I make no order as to costs.

V.B./R.K.

Application rejected.

A. I. R. 1919 Allahabad 340

RICHARDS, C. J. AND RAFIQUE, J.,
Todar Singh and another—Appellants.
v.

Kehri Singh and another—Respondent.
First Appeal No. 190 of 1917, Decided on 20th February 1919 from the decision of First Addl. Sub-Judge, Aligarh, D/- 18th April 1917.

(a) Pre-emption—Suit for Wajibularz giving preferential right to cosharers—Cosharers conduct amounting to refusal to purchase—He is not entitled to succeed.

A wajibularz provided that if a cosharer wished to mortgage or sell his share he should do so first among his cosharers and in case of their refusal, to others. In September 1914, a vendor gave notice to his cosharers, including the plaintiff, offering to sell certain property. None of the cosharers gave any answer to the notice or expressed his willingness to purchase the property. Subsequently the vendor sold the property to the defendant and the plaintiff brought a suit for pre-emption just within the period of limitation.

Held: that under the circumstances the plaintiff's conduct amounted to a refusal to purchase the property and he was therefore not entitled to succeed. [P 342 C 1]

(b) Pre-emption—Suit for—Price inflated for avoiding pre-emption and beyond market value—Onus is on vendee to explain reason for such abnormal price and show payment of consideration

Where the Court sees that the price has been inflated for the purpose of avoiding pre-emption, and that the price is clearly beyond the reasonable market-value of the property, the onus lies on the vendee to show the actual payment of the consideration and to explain why an abnormal price was given. But in cases where there is nothing to show that the sale price mentioned in the deed is exorbitant there is no such onus cast upon the vendee.

[P 342 C 1, 2]

Baldeo Ram and Surendro Nath Sen
—for Appellants.

B. E. O'Connor and Panna Lal—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The Court below decreed the suit. The defendants-vendees have appealed. They contend that no custom is proved; secondly, that the plaintiff pre-emptor refused to purchase; and thirdly, that the Court below has erred in dealing with the question of consideration. There are some circumstances connected with the history of this village which might create some doubt as to the existence of a custom. In the view however that we take in the present case it is unnecessary for us to go into this question. It is an admitted fact that about a year before the sale, that is in September 1914, the vendor gave a written notice to the cosharers including the plaintiff in the following words:

"On account of heavy debt it is resolved that the ancestral property, i. e., a six-biswa share, i. e., 86 shares comprising 338 bighas 4 biswas of land and bearing a jama of Rs. 377-11-6, according to the present khewat, out of 144 shares in the 10 biswas 3 biswansis 6 $\frac{3}{4}$ kachwansi mahal in Mouza Kidhara, should be sold at 3 annas per

cent. Hence this notice is sent to you the cosharers severally so that if any one wants to purchase the property he should do so within a month: Otherwise he will be debarred of his right of pre-emption."

Apparently the vendor was unable to find a purchaser for sometime, but it is an admitted fact that the plaintiff pre-emptor never gave any answer to this notice or in any way proclaimed that he wished to purchase the property. Even after the property was sold by a registered sale deed on 13th October 1915, the present suit was not instituted until 11th November 1916, that is to say, more than a year after. The suit would even have been barred by limitation except for certain holidays in the Court below. The Court below in dealing with this matter says:

"The property was not clearly stated in the notice, and it was not unreasonable that the plaintiff waited until it was disclosed which property was to be sold and for what price. It was very necessary and reasonable that after the defendant had talked with the defendant vendee he should have informed the plaintiff of the proposed transaction stating the correct quantity of the property to be sold and the amount which the stranger was offering for it. If then the plaintiff refused, or remained silent, he should have been entitled to sell it to the stranger."

It seems to us that this was a very unreasonable view to take. In the first place, the only difference so far as the description of the property is concerned is that the plaintiff mentioned 86 shares as being what he intended to sell while in point of fact he sold only 74. There is nothing to show that the rate, namely 3 annas, was not in or about the rate at which the property was actually sold. We cannot of course be quite certain what were the actual profits. The plaintiff gives one version as to the amount of profits, the defendant another. The Court below says that after the vendor had talked with the vendee and arranged the price, he should then have come back to the pre-emptor and offered the property to him. Surely this would be an unreasonable burden to cast on the vendor. How could a vendor be expected to find an outsider and arrange with him about the sale of the property, when all the time the outsider would know that before the bargain could be concluded the vendor must go back to all the cosharers? The vendor in such case would be driven from pillar to post, first to his cosharers, then to the outsider and then from the

outsider back to the cosharers. In connexion with this let us see what the custom was as proved by the entry in the wajibularzes of 1856 and 1872. The entry in the wajibularz of 1856 is:

"If a cosharer wishes to mortgage or sell his share, he should do so first among the cosharers, in case of their refusal, to others."

In the wajibularz of 1872 the record is:

"Every cosharer has power to transfer his property. At first he will sell it to his near cosharers in the village but if they also refused to take it, then he shall have power to transfer it to any person he may like."

Assuming as we have said before that these entries referred to a custom of pre-emption, we think that the vendor complied with that custom when he served the written notice on the plaintiff pre-emptor. It was a clear offer to sell to the cosharer. The custom as proved is not that the vendor should first find an outsider ready to purchase and then go to the cosharer. Such a custom, if it existed, would seem to be unreasonable and almost impossible to comply with. We think that under the circumstances of the present case, the plaintiff having ignored the notice that was served upon him and never having intimated to the vendor that he wished to buy and having waited even after the property was sold for more than a year, we should draw the inference that he refused to purchase the property. With regard to the consideration it is not strictly necessary for us to say anything, but in case there may be any further litigation we think it right to make a few observations. It does not appear to have been in any way established that this property was not worth the price mentioned in the sale deed. In other words, there was nothing to show that a fictitious price had been mentioned in order to prevent pre-emption.

The Court below has disallowed an item of Rs. 5,040 alleged to have been paid by the vendee in discharge of promissory note due by the vendor. The vendee adduced evidence to show that this promissory note had been discharged and there was of course acknowledgment in the sale deed of the receipt of the full consideration by the vendor. This Court has always held that where the Court sees that the price has been inflated for the purpose of avoiding pre-emption, and that the price is clearly beyond the reason-

able market-value of the property, the onus lies on the vendee to show the actual payment of the consideration and to explain why an abnormal price was given. But in cases where there is nothing to show that the sale price mentioned in the deed is exorbitant there is no such onus cast upon the vendee. If we had been granting a decree for pre-emption, we would have made the decree conditional upon payment of the full price mentioned in the sale deed. We may mention in passing that the lower Court seems to have made a mistake in calculation of about Rs. 400 against the defendant. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts. Costs in this Court will include fees on the higher scale.

V B./R.K.

Appeal allowed.

* A. I. R. 1919 Allahabad 342

BANERJI AND PIGGOTT, JJ.

Ganeshi Singh—Defendant—Appellant.

v.

Shyam Singh and another—Plaintiffs—Respondents.

Second Appeal No. 1086 of 1918, decided on 8th August 1919, against the decision of the Offg. 1st Addl. J., Aligarh, dated 17th April 1915.

(a) Civil P. C. (5 of 1908), O. 32, R. 3—Rule 3 is not retrospective.

Where a suit was instituted and a guardian ad litem appointed of the minor defendants when the Civil Procedure Code of 1882 was in force, objection cannot be taken to the appointment of the guardian on the score of want of notice to the minors, as S. 456 of that Code did not require that notice should go personally to, and be served personally upon the minors. [P 343 C 1]

*(b) Civil P. C. (5 of 1908), O. 32, R. 4—Adverse interest—Mortgage suit against father and minor son—Father's interest is not necessarily adverse—He can be guardian.

Where the guardian ad litem of minor defendants is their father and is also the mortgagor of the suit property, it does not necessarily follow that his interests are adverse to the minors who with him form a joint family of which he is the managing member. [P 343 C 2]

N. P. Asthana—for Appellant.

J. K. Mukerjee and Kanhaya Lal—for Respondents.

Judgment.—The facts out of which this appeal arises are these:—One Yad Ram made a mortgage of joint ancestral property in favour of Ganeshi Singh appellant on 8th February 1897. On 7th February 1908 a suit was brought by the mortgagee to enforce the mortgage and the defendants to the suit were Yad Ram

and his four sons., two of whom, Shib Dayal and Shib Singh, were of full age and the other two, namely, Shyam Singh and Sheo Dan Singh were minors. An application was made to the Court, supported apparently by an affidavit praying that Yad Ram should be appointed guardian ad litem of the two minor defendants. This application was granted by the Court and Yad Ram was appointed guardian of the minors for the suit. This proceeding took place under the provisions of the Code of Civil Procedure which was in force at the time when the suit was filed. The suit was not defended and an ex parte decree was made in favour of mortgagee on 10th March 1909. The present suit was brought on 5th November 1914 by the four sons of Yad Ram for a declaration that the decree obtained by the mortgagee, Ganeshi Singh, on 10th March 1909 was not binding on them. The grounds upon which they brought the suit were that the decree was obtained fraudulently that the minors were not properly represented in the suit. The Court of first instance dismissed the suit, finding that there was no fraud and that the minors were properly represented by their father, who was the manager of the joint family of which he and his sons were members. The lower appellate Court agreed with the Court of first instance in finding that there was no fraud and that the allegation of fraud was not established. It dismissed the appeal of the two adult sons of Yad Ram but decreed the appeal and the suit of the minors on two grounds, first, that the appointment of the guardian was in contravention of the provisions of O. 32, R. 3 of the present Civil P. C. and, secondly, that Yad Ram was not a fit and proper person to be appointed guardian of the minors.

As regards the first ground of the lower appellate Court's decision it seems to us to be erroneous. As we have stated above, the suit was filed and the guardian was appointed when the Code of Civil Procedure of 1882 was in force. S. 456 of the Code provided the procedure for the appointment of a guardian ad litem. It did not require that notice of the application for the appointment of such a guardian was to go to the minors personally and was to be served on them personally. Therefore, the procedure adopted by the Court was in accordance with the provi-

sions of S. 456. Then remains the question whether the guardian appointed was a fit and proper person to be appointed having regard to the provisions of S. 457. It is contended that Yad Ram had an interest adverse to that of the minors. It does not necessarily follow that because he was the mortgagor, his interests were adverse to those of his sons who with him formed a joint family of which he was the managing member. It is not suggested in the plaint that the debt was incurred for immoral purposes. All that is said is that it was not a lawful debt. By this we suppose it is meant that the debt was not incurred for family necessity. If that had been a true defence to the suit of the mortgagee, one would have expected the adult sons of Yad Ram to have appeared and put forward that defence. They did not do so but allowed a decree to be passed against them. Upon the findings of both the Courts below the service of summons was duly effected and the allegations of the plaintiffs that they had no notice of the suit is untrue. We think that the learned Additional Judge was not right in holding that because Yad Ram was the mortgagor his interest was necessarily adverse to that of his minor sons. The proceedings in the previous suit were not, therefore, vitiated by any defect in the appointment of the guardian ad litem of the minor plaintiffs to this suit and their claim was rightly dismissed by the Court of first instance. We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts.

We may mention that the respondent No. 2, Sheo Dan Singh, who has not appeared in this appeal was at the front when the appeal was filed, but he was subsequently served when he was in this country but he has not chosen to appear. The appeal was, therefore, heard in his absence.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 343

RAFIQUE AND WALLACH, JJ.

Pohkar—Decree-holder—Applicant.

v.

Ram Lal—Opposite Party.

Civil Revn. No. 143 of 1918, Decided on 13th August 1919, against order of Asst. Collector, 1st Class, Muttra, D/- 16th April 1918.

**Agra Tenancy Act (2 of 1901), S. 167—
Order rejecting restitution however wrong—
No revision lies.**

An order made by an Assistant Collector rejecting an application for restitution, however erroneous, is not open to revision by the High Court. [P 344 C 1]

S. N. Mukerji—for Appellant.

N. P. Asthana—for Respondent.

Judgment.—This is an application in revision from an order of an Assistant Collector rejecting the application of the applicant for restitution. It appears that a suit was brought against the applicant for recovery of profits. The learned Assistant Collector, in whose Court the suit was filed, decreed the claim of the opposite party for about Rs. 700. On appeal the decree in favour of the plaintiff was increased by a few hundred rupees on account of interest. In second appeal to this Court the decree was reduced to about Rs. 200. In the meantime the opposite party had executed the decree of the first appellate Court. After the decision of the case in this Court, the applicant before us presented a petition to the Assistant Collector for restitution namely for the recovery of the difference between the decree of the first appellate Court and the decree of this Court. The Assistant Collector rejected the application and directed the applicant to file a regular suit. There can be no doubt that the order of the Assistant Collector is erroneous and must have been passed under a misapprehension. No remedy is open by way of a regular suit to the applicant to recover the balance of the money that was realised by the opposite party in execution of the decree of the first appellate Court. A preliminary objection is taken on behalf of the opposite party to the application in revision to this Court on the ground that no revision lies. This objection is supported by authority and we need only mention one case, *vide Damber Singh v. Sri Kishun Das* (1). On behalf of the applicant great stress is laid on the fact that if the present application is rejected, he, the applicant, has no remedy anywhere. We think that the application for restitution made by the applicant, though rejected by the learned Assistant Collector, does not prevent him, the applicant, from making another application before the Revenue Court. We have no doubt that if the matter is pro-

perly put before the learned Assistant Collector he will take action upon it. In any case the present application is not maintainable. We therefore dismiss it but in the circumstances of the case make no order as to costs.

V.B./R K. *Application dismissed.*

A. I. R. 1919 Allahabad 344

RICHARDS, C. J. AND BANERJI, J.
Jagannath—Applicant—Appellant.

v.

Ganga Dutt Dube—Opposite Party—Respondent.

First Appeal No. 159 of 1918, Decided on 3rd March 1919, from order of Dist. Judge, Benares, D/- 28th June 1918.

Provincial Insolvency Act (1907), Ss. 15, 16 and 43—Petitioner suspected to have committed offence under Act—Court should proceed under S. 43 and not dismiss application.

If there is any just reason for thinking that a petitioner for adjudication in insolvency has committed an offence punishable under the insolvency Act, the proper course for the Court to adopt is, not to dismiss the petition, but to proceed under S. 43 of the Act after first making a declaration of insolvency and framing a charge in analogy to the provisions of the Code of Criminal Procedure.

The mere fact that the Court suspects a petitioner for adjudication to have been guilty of criminal misappropriation is not a ground for dismissing the petition. [P 345 C 1]

R. K. Malaviya—for Appellant.

Gokal Prasad—for Respondent.

Judgment.—This appeal arises out of insolvency proceedings. Panda Jagannath, the appellant here, presented a petition to be declared an insolvent. He had been arrested in execution of a decree obtained by Ganga Dutt Dube. It is quite clear that on the admitted facts Panda Jagannath was entitled to have an order declaring him an insolvent. It appears that a civil suit had been brought against Panda Jagannath by Ganga Dutt Dube, in which it was alleged by the latter that Panda Jagannath had misappropriated, certain diamonds which had been delivered to him for sale on commission. The first Court had dismissed the suit. On appeal however the decree of the Court of first instance was set aside and a decree for Rs. 800 odd was made against Panda Jagannath. The learned District Judge, in dismissing the petition of Jagannath to be declared an insolvent, seems to have considered that the decree against him at the instance of

(1) [1909] 31 All.445=2 I. C. 377.

Ganga Dutt Dube must be taken as an adjudication that the diamonds had been criminally misappropriated by Panda Jagannath, particularly having regard to the fact that Panda Jagannath did not file a second appeal. This, we think, was quite wrong. Very little weight can be attached to the fact that no second appeal was filed, because in all probability the appeal would at once have failed upon the ground that it was a finding of fact behind which the High Court cannot go in second appeal.

In any event if there was any just reason for thinking that Panda Jagannath had committed an offence punishable under the Insolvency Act, the proper course for the Court would have been to have proceeded under S. 43, after having first made a declaration of insolvency and after also having framed a charge in analogy to the provisions of the Code of Criminal Procedure [see *Chhatrapat Sinhy Dugar v. Kharag Singh Lachmi-Ram* (1) and also *Tirloki Nath v. Badri Das* (2)]. We think that the order dismissing the application of Panda Jagannath was wrong. We allow the appeal, set aside the order of the Court below and adjudicate Panda Jagannath an insolvent. The case will now be sent back to the Court below to proceed with the insolvency matter in due course of law. The appellant will have his costs in this Court, including fees on the higher scale.

V.B./R.K.

Appeal allowed.

- (1) A. I. R. 1916 P. C. 64=44 Cal. 535=39 I.C. 788=15 A. L. J. 87=(1917) M. W. N. 100=32 M. L. J. 1=19 Bom. L. R. 174=25 C. L. J. 215=21 C. W. N. 497=10 Bur. L. T. 25=44 I. A. 11 (P. C.).
 (2) A. I. R. 1914 All. 17=23 I. C. 4=36 All. 250.

A. I. R. 1919 Allahabad 345

PIGGOTT AND WALSH, JJ.

Jai Narain and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 842 of 1918, Decided on 15th February 1919, from an order of First Class Magistrate, Cawnpore.

(a) Public Gambling Act (1867), Ss. 3 and 4—Keeping common gaming house—Friendly game during Diwali festival—No offence under S. 3 or S. 4.

Accused 2 to 16 were found gaming with cowries on the first night of the Diwali festival in the house of accused 1. It was not proved

that there was any idea of paying a percentage on the winnings to accused 1 or of the latter deriving any sort or kind of profit from the use which was being made of his room, or that the room had on previous occasions been used for the purpose of gaming.

Held: that the accused could not be convicted of any offence under S. 3 or S. 4, Public Gambling Act.

[P 347 C 1]

(b) Criminal trial—Duty of Court—Magistrate cannot import personal knowledge of character of witness into his decision.

A Magistrate is not justified in importing any personal opinion which he might have had occasion to form regarding the personal character, or the general reputation of a witness for the prosecution, into his decision of the case, or in putting it forward as a reason for refusing to believe the evidence laid before him on behalf of the accused.

[P 347 C 1]

Boys and Wanchoo—for Accused.

Asst. Govt. Advocate—for the Crown.

Piggott, J.—These are applications in revision by Jai Narain and 15 other persons against an order by a First Class Magistrate of Cawnpore. Jai Narain has been convicted of keeping a common gaming house under S. 3, Public Gambling Act 3 of 1867, while the remaining applicants have been convicted under S. 4 of the same Act of having been found in the house kept by Jai Narain playing or gaming with cowries. It is an admitted fact that, on the date specified in the charge, when the then Kotwal of Cawnpore, Munshi Baqar Ali, proceeded to a house in the city of Cawnpore belonging to Jai Narain, he found the said Jai Narain and the remaining applicants in a room of that house engaged in playing or gaming with cowries. The question whether these convictions are or are not justified turns entirely upon the question whether or not, on the said occasion the applicant Jai Narain was making a profit out of the gambling which was going on there. The case for the prosecution is that he was doing so by taking a percentage on the winnings. The case for the defence is that, the day in question being the first day of the Diwali festival, the applicants were engaged in a friendly game, in the course of which there was no idea of paying a percentage on the winnings to Jai Narain, or of Jai Narain's deriving any sort or kind of profit from the use which was being made of his room. The Joint Magistrate has no doubt appreciated this point, has directed his mind to it and has arrived at a conclusion adverse to the applicants. When it came to weighing the evidence on both sides, and it may be remarked that there

was a great deal of conflicting evidence bearing on the main question in issue, the Court was necessarily invited to consider a further point. The action of Munshi Baqar Ali Khan had been taken on information given him by one Mangan, a disreputable person who had himself been convicted of keeping a common gaming house not long before. Mangan had given the information, on the strength of which a search warrant was eventually issued on the previous day, that is to say, before any date on which the Diwali festival can be said to commence. He gave evidence at the trial and, according to his evidence, the room in which the applicants were found had been used on previous occasions as a common gaming house for the profit of Jai Narain. That is to say, according to the evidence of Mangan, Jai Narain was not merely making a profit out of the use of his room by a number of persons who would not ordinarily think of frequenting a common gaming house, and had assembled at that time and place for the purpose of indulging in a game of chance in connexion with the ordinary observance of the Diwali festival, but on the contrary was in the strict and literal sense of the words "the keeper of a common gaming house," to which the public were in some way or other invited to resort independently altogether of the Dewali observances.

The question whether Mangan was or was not speaking the truth on this point was only incidentally in issue. He might have been lying and the defence might have been speaking the truth, when they said that this particular room had never been used for that purpose before, that they would none of them have thought of resorting to it for the purpose of gaming but for the fact that the night in question was the first of Dewali festival, and yet the case for the prosecution might be so far true that Jai Narain by making a profit out of the use which he permitted to be made of his room had converted himself for the occasion into the keeper of a common gaming house had transgressed the law and had involved all the remaining applicants in the criminal liability which he thereby incurred. Nevertheless the question whether Mangan was or was not speaking the truth about the previous user of this room for gaming purposes was a highly

important one from two different points of view. Obviously it affected in a very crucial manner the credibility of the evidence given by Mangan on the one side and by a number of defence witnesses on the other.

Besides this it had a very definite bearing on the question of the validity of the warrant under which the house was searched and on the applicability of the provisions of S. 6, Public Gambling Act to the facts of the case. If the defence is true to this extent at any rate, that the room had never previously been used for gaming purposes, then the information given by Mangan before the date of the search that the room was being used as a common gaming house was false information and the question whether the District Superintendent of Police was justified in treating the information which reached him through Munshi Baqar Ali from Mangan as credible information becomes a more difficult one than it would otherwise be if the Court were satisfied that the information given by Mangan had been in fact true. After carefully considering the judgment recorded by the learned Joint Magistrate, I cannot resist the conclusion that he has decided this case without really making up his mind as to whether or not Mangan was speaking the truth regarding the previous user of this room and that, when he came to the question of passing sentence, he felt himself under a moral obligation to give the accused Jai Narain at least the benefit of the doubt that this part of Mangan's story was not true. If he had not done this, I should find it difficult to understand how he considered a fine of Rs. 20 an adequate punishment for the offence of which he found Jai Narain guilty. Apart from these considerations, which seem to me important, there are two passages in the judgment of the Court below to which I take strong exception. After noting the fact that the accused strongly impeached the credibility of some of the evidence given by Munshi Baqar Ali and in fact contended that some of his evidence was, as the Joint Magistrate puts it deliberately false, he goes on to say:

"No one who knows the D. S. P. and the extraordinarily high reputation he enjoys for truthfulness and honesty can credit this."

I understand from another passage in the judgment that Munshi Baqar Ali has

since been promoted to the post of Deputy Superintendent of Police and that initials "D. S. P." in this portion of the judgment refer to this fact, as they undoubtedly must be taken to refer to the evidence given by Munshi Baqar Ali. The Joint Magistrate was in no way justified in importing any personal opinion which he might have had occasion to form regarding the personal character, or the general reputation, of the principal witness for the prosecution into his decision of the case, or in putting it forward as a reason for refusing to believe the evidence laid before him on behalf of the accused. The other passage in the judgment to which I take exception runs as follows:

The accused have made a great deal out of nothing, and I cannot approve of their undignified missions to District Officials with the offer of large charities in return for the withdrawal of the case."

This is a reference to something which, so far as I can ascertain from the record, was not in evidence, and which as it seems to me could not be legally in evidence in the case. It may be suggested that the words occur in a passage in the judgment where the Court, after having recorded its conclusions of fact, is merely proceeding to discuss the question of sentence. I desire to make all reasonable allowance for this, but I must say that in my opinion the accused persons in a case of this sort, and particularly in view of the fact that they were being tried summarily, were entitled to have the question of their guilt or innocence determined by a Court the presiding officer of which was not aware of any negotiations which may or may not have been attempted on behalf of the said accused with a view to obtaining a withdrawal of the prosecution. It makes it worse to my thinking that this fact was so clearly present to the mind of the Joint Magistrate that he could not keep it out of the concluding portion of his judgment. For these reasons I feel no hesitation in saying that we ought to set aside the conviction and the sentences in this case in respect of all the applicants. When we have done this, the further question, no doubt, arises whether we ought or ought not to order a re-trial. I mention this fact to show that it has been considered by us. We have examined the record as it stands and taken into consideration the arguments addressed to us, more parti-

cularly with a view to enabling us to arrive at a conclusion whether the interests of justice require the re-trial, either of Jai Narain alone, or of all the applicants. I do not think it in any way incumbent upon us once we have made up our minds that the order of the Court below cannot be supported, to enter into our reasons for arriving at one conclusion or the other with regard to the propriety of a new trial. I therefore merely remark that I do not feel at all satisfied that the interests of justice would be served by an order directing any of these persons to be re-tried on the charges on which they have already been convicted. It follows that in setting aside the order of the Court below we must record a formal order of acquittal. I would, therefore set aside the conviction and the sentences passed in this case, acquit all the applicants of the offences charged and direct that the fines, if paid, be refunded.

Walsh, J.—I entirely agree. I only want to add that we are deciding nothing with a view to discouraging prosecution of persons who keep and use common gaming houses where members of the public may resort. Persons who keep and use such houses for their personal gain are liable to heavy fines, and if the Magistrate had really thought in this case that that was what Jai Narain was doing, the fine of Rs. 20 which he was inflicted is absolutely unintelligible. And members of the public who resort to such places similarly render themselves liable to punishment by the criminal Courts. I would merely add that it would appear that there is at any rate a certain amount of this sort of thing in Cawnpore and that in my judgment the police authorities would be better advised to devote their energies to watching and collecting evidence against real gaming houses instead of making sporadic raids, at a time of the year when numbers of people may be reasonably expected to be engaged in gambling, upon persons in the town with regard to whom they have made no serious effort to collect any incriminating evidence.

By the Court.—We, therefore allow the applications, set aside the conviction and sentences passed against the applicants, acquit them of the offences charged

and direct that the fines, if paid, be refunded.

V.B./R.K. *Applications allowed.*

A. I. R. 1919 Allahabad 348

PIGGOTT AND WALSH, JJ.

Kunj Behari Lal Rastogi—Petitioner—Appellant.

v.

Madhsodan Lal—Receiver—Respondent.

First Appeal No. 127 of 1918, Decided on 30th January 1919, from an order of Dist. Judge, Farrukhabad, D/- 19th July 1918.

(a) Provincial Insolvency Act (1907), Ss. 36 and 37—Court should guard interest of creditors—Receiver appointed having legal training—It should be left to him to take steps to annul transfers.

It is the duty of an insolvency Court to be astute to look after insolvency proceedings so as to ascertain whether anything can be saved for the creditors, but where a Receiver is appointed and he is a gentleman of legal training, it is better to leave him to take the initiatory steps to get voidable or fraudulent transfers annulled.

[P 348 C 1,2]

(b) Provincial Insolvency Act (1907), Ss. 36 and 37—Transfer sought to be annulled—Transferee should have opportunity to defend.

Where a transfer is sought to be annulled in insolvency proceedings, the transferee ought to be given a proper opportunity to defend his legal position.

[P 348 C 2]

(c) Provincial Insolvency Act (1907), Ss. 36 and 37—Mortgage effected by insolvent within two years before adjudication—Bad faith should not be imputed to mortgagee.

Prima facie old debts constitute good consideration the adequacy of which the Court should refuse to enter into. There is no reason imputing bad faith to a mortgagee who takes an ordinary security for his debt merely because some two years or eighteen months afterwards his debtor becomes an insolvent.

It is the duty of the Court to assume good faith in the case of a transaction supported by valuable consideration.

[P 348 C 2]

S. M. Sulaiman—for Appellant.

Gulzari Lal—for Respondent.

Judgment.—It is impossible to support the order in this case. In the first place, the learned Judge acted upon his own motion without any proceedings on behalf of the Receiver calling upon the Court to adjudicate as to this mortgage between the estate and the mortgagee. We do not wish to say anything to discourage the intervention of the Court in insolvency matters where no receiver is appointed, and the duty of the Court is to be astute to look after the insolvency proceedings so as to ascertain whether anything can be saved for the creditors,

but where a Receiver is appointed and he is a gentleman of legal training, as in this case a vakil, it is better to leave him to take the initiatory steps for a proceeding of this kind, which is a serious matter and in the nature of a suit.

The only notice which the mortgagee got seems to have been a verbal notice in Court in a proceeding in which he was not in the least concerned, or at any rate in respect of which he had received no specific notice. He not unnaturally when called upon to defend his legal position, desired the assistance of a legal gentleman. The learned Judge gave him the opportunity, if it can be called one, of asking a gentleman to argue the case then and there of which he knew nothing but refused adjournment. The learned Judge jumped a little too soon and the proceeding which we have described, would alone be sufficient to nullify the order and would necessitate our sending the case back for reconsideration. But the learned Judge has dealt to some extent with the merits and in doing so we are bound to point out that he has confused Ss. 36 and 37. While purporting to set aside this transaction under S. 36, he has really given reasons which are only applicable to S. 37. The finding at which he has arrived on the scanty materials before him amounts to this, that more than three months before the commencement of the insolvency but within two years of the order of adjudication this mortgage was granted by the debtor to the creditor in lieu of old debts. Prima facie old debts constitute good consideration the adequacy of which the Courts have always refused to enter into, and there is no reason in the world for imputing bad faith to a mortgagee who takes an ordinary security for his debt merely because some two years or eighteen months afterwards his debtor becomes an insolvent.

The learned Judge assumed bad faith without the slightest evidence of it, where as his legal duty would be to assume good faith in the case of a transaction supported by valuable consideration as this is. In the ordinary case where there had been a miscarriage of this kind we could not refuse to the Receiver the right to have the case sent back in order to attack the transaction, if he could do so with any hope of success. But of course

if he chose to take that burden upon himself and failed, he would render himself liable to pay costs of the proceedings not out of the estate but out of his own pocket. That is probably the reason why the Receiver has not run the risk of making an apparently hopeless attack upon the transaction in this particular instance. Mr. Sital Prasad Ghose representing the Receiver has in our view exercised a right discretion in refusing on behalf of the Receiver to take that burden upon himself. The result is that on the facts before us it is our duty to declare that the creditor is a secured creditor in respect of this mortgage. He had better reconsider his position in the light of what has now been said and value his security so as to give the Receiver an opportunity either of accepting such valuation, and allowing the creditor to prove for the balance or of making another attempt to sell the property subject to the charge. Under the circumstances, though it seems rather hard upon the creditor, the appeal must be allowed and the declaration made to which we have referred, but the creditor must pay his own costs. There will be no costs of these proceedings either here or in the Court below. The Receiver will be allowed his costs in both Courts out of the estate.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 349**

RAFIQUE AND PIGGOTT, JJ.

Kedar Nath and another—Defendants—Applicant.

v.

Sheo Pratap — Plaintiff — Opposite Party.

Civil Revn. No. 58 of 1918, Decided on 4th April 1919, against order of Sub-Judge., Agra, D/- 21st February 1918.

(a) Civil P. C. (5 of 1908), S. 115—Other remedy is open—No revision.

Where an alternative remedy is provided, the High Court will not entertain an application for the exercise of its powers of revision under S. 115 Civil P. C. [P 349 C 2]

(b) Civil P. C. (5 of 1908), S. 115 and O. 14, R. 1—No revision lies on refusing to frame issue—Objection can be urged in appeal.

A trial Court refused the request of the defendant's pleader to frame a particular issue and the defendant moved the High Court in revision. At the hearing a preliminary objection was taken that no revision lay from an interlocutory order:

Held: that the application was not maintainable, inasmuch as another remedy was open to the defendant, viz., that if he was adversely affected

by the omission of the proposed issue, he could appeal to the High Court and urge the objection that his defence was not considered in its entirety. [P 349 C 2]

N. P. Asthana and G. Agarwala—for Applicant.*Tej Bahadur Sapru and S. K. Dar*—for Opposite Party.

Judgment.—This is an application in revision under S. 115, Civil P. C., by the defendants to a suit pending in the Court of the Subordinate Judge of Agra. The plaintiff sued to recover money alleged to be due on a contract. The defendants urged two pleas, namely, that no such contract as was stated in the plaint had taken place between the parties and, secondly, that if any contract did take place between the parties, it was of a wagering nature and could not be enforced. The learned Subordinate Judge examined the defendants before proceeding any further in this case. He recorded their statements in a rubkar, dated 21st February 1918. After writing the depositions of the two defendants the Court framed three issues. The pleader for the defence asked the learned Subordinate Judge to add a fourth issue to the effect that the contract, if any, between the parties was a wagering contract. The learned Subordinate Judge disallowed the prayer of defendant's pleader.

The defendants have presented the present application in revision from the order of the learned Subordinate Judge rejecting the request of their pleader to add a fourth issue in the case about the character of the contract. A preliminary objection is taken on behalf of the plaintiff to the effect that no revision lies from an interlocutory order. A number of cases have been cited on behalf of the plaintiff-respondent in support of the preliminary objection, while the learned counsel for the appellants relies upon certain cases of this Court as also upon some cases of other High Courts. We think it unnecessary to express an opinion upon the pure and net question of law whether a revision from an interlocutory order lies to this Court or not, as in the present case the applicants have another remedy open to them also when the case goes to trial and is disposed of. If they are by the omission of the proposed issue affected adversely and lose the case in the first Court, they can always in appeal to this Court urge the objection that the de-

fence was not considered in its entirety. Under these circumstances the present application is not maintainable. We would however like to remark that it would have been advisable, and it is still open to the Subordinate Judge to do so, if an issue were framed or is framed in accordance with the suggestion of the defendants-appellants, it would, in our opinion, save further trouble in the case.

We dismiss the application but make no order as to the costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 350

RICHARDS, C. J., AND BANERJI, J.

Durga Das and another—Applicants.

v.

Jai Narain and others—Opposite Parties.

Civil Revn. No. 70 of 1918, Decided on 7th March 1919, from the order of Addl. Judge, Aligarh, D/- 20th December 1917.

Civil P. C. (1908), Ss. 16 and 20—Scope of S. 16 (a) and S. 16 (d) indicated—Suit for dissolution of partnership with usual ancillary relief does not fall either under Cl. (a) or under Cl. (d) of S. 16.

Clause (a), S. 16, Civil P. C. refers to suits to recover possession of immovable property where the title to that property is alleged by one side to be in him and by the other side to be in him, and clause (d) of the section refers to other suits of a like nature where the title to or some interest in the property is in dispute and the Court has to determine the matter.

A suit for dissolution of partnership with the usual ancillary relief does not fall either under clause (a) or under clause (d), S. 16 Civil P. C. and can be brought in the Court within whose jurisdiction the parties reside or the cause of action arises. [P 350 C 2]

P. L. Banerjee—for Applicants.

S. N. Gupta for S. N. Sen—for Opposite Parties.

Judgment.—This application arises out of a suit for dissolution of partnership. It is admitted that the parties reside within the jurisdiction of the Court at Aligarh. It is admitted that the cause of action arose within the jurisdiction of the Court at Aligarh. It appears, however, that the factory which belongs to the partners is situate, outside the jurisdiction. The defendants pleaded that the Court at Aligarh had no jurisdiction to hear the case and that the suit should have been brought where the factory was situate. This contention found favour with both the Courts below. The plaintiffs have challenged the order

of the Court below by this application in revision. We think that the decisions of the Courts below were incorrect. It is admitted that unless the case can be brought within the provisions of S. 16 of the Code, the proper Court in which to institute the suit was the Court at Aligarh. S. 16 provides:

"Subject to the pecuniary or other limitations prescribed by any law, suits, (a) for the recovery of immovable property with or without rent or profits, (b) for the partition of immovable property, (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property, (d) for the determination of any other right to or interest in immovable property * * * shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

It is contended that the case is within either clause (a) or clause (d). We are clearly of opinion it does not come under clause (a). That clause refers to what are known as suits to recover possession of immovable property when the title to that property is alleged by one side to be in him and by the other side to be in him. In the present case both sides admit that the property belongs to them both, that is to say, that it is partnership property. It is not sought to recover possession of the factory. Clause (d) clearly refers to other suits of a like nature where the title to or some interest in the property is in dispute and the Court has to determine the matter. Again in the present case there is no dispute at all as to whom the property belongs to. Nor is there any dispute as to any interest in this property. The only event that may happen is that possibly in the course of the suit the factory may be ordered to be sold with a view to the distribution of the assets of the partnership. We are clearly of opinion that a suit for dissolution of partnership with the usual ancillary relief is not a suit for the "determination of any other right to or interest in immovable property" within the meaning of clause (d). We allow the application, set aside the orders of both the Courts below and send back the case to the Court of first instance through the lower appellate Court, with directions to re-admit the plaint upon its original number in the file and to proceed to hear and determine the suit as speedily as possible. The record may be returned by this Court at an early date. The respondent will have to pay the costs incurred in the Court of

first instance by reason of the order of that Court, the appeal to the lower Appellate Court and the application in revision here, including in this Court fees on the higher scale.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 351 (1)

PIGGOTT, J.

Debi Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 519 of 1919, Decided on 7th July 1919, against order of Sess. Judge., Aligarh, D/- 30th April 1919.

Evidence Act (1 of 1872), S. 33—Statement of deceased plaintiff examined as witness that receipt filed by defendant accused was forgery is admissible in evidence in criminal prosecution of accused and if it is believed is sufficient for conviction.

Accused, when defendant in a civil suit brought against him to recover a certain debt, produced a receipt purporting to have been signed by the plaintiff, showing that the debt had been discharged. The plaintiff was examined as a witness in the suit and he deposed that the receipt was a forgery. The prosecution of the accused was thereupon ordered, but before the trial came off the plaintiff died and his statement in the civil suit was admitted in evidence in the criminal case against the accused. The accused was convicted and the question in appeal before the High Court was whether the statement of the deceased plaintiff was admissible in evidence and whether the Court was justified in believing that statement:

Held: that the statement had been rightly admitted as the accused had an opportunity of cross-examining the deponent at the time the statement was made and the proceedings were between the same parties within the meaning of the explanation to S. 33, and that if the Court was satisfied on a review of the entire evidence that the deponent had spoken the truth, his statement in the civil suit was sufficient to prove that the receipt was a forgery. [P 351 C 2]

*S. C. Mukerji and Panna Lal—*for Appellant.

*The Govt. Pleader—*for the Crown.

Judgment.—The case against the appellant, Debi Singh, was that he produced a receipt for the payment of a sum of Rs. 2,340, which receipt purports on the face of it to have been signed by one Kishen Singh. This receipt was produced before a civil Court when Debi Singh was being sued for the recovery of a certain debt, and his case was that he had discharged that debt in its entirety by means of the payment evidenced by the receipt above mentioned. Kishen Singh was examined as a witness before the civil Court and deposed that the receipt was a for-

gery. It so happened that Kishen Singh was dead before the appellant could be put on his trial on the criminal charge but I am satisfied that the statement of Kishen Singh made before the civil Court has been rightly admitted in evidence. The appellant had an opportunity of cross-examining Kishen Singh at that time and the proceedings were between the same parties within the meaning of the explanation to S. 33, Evidence Act. The real question, therefore is whether the Court below was justified in believing the sworn statement of Kishen Singh, to the effect that he had never signed this receipt. In the judgment under appeal the evidence produced in the case is set forth and discussed in considerable detail. The learned Sessions Judge has pointed out that there is a suspicious mistake apparent on the face of the receipt itself and that there is a mass of circumstantial evidence tending to show that Debi Singh could not have paid a sum of Rs. 2,340 in cash to any one on the date given in the receipt. It has been contended before me in argument that Debi Singh has really been convicted because he failed to prove affirmatively the payment of the money in question, but this is not a correct view of the case. The Court had before it the testimony of Kishan Singh, admissible under the provisions of the Evidence Act, as already noticed. That testimony was sufficient to prove that the receipt was a forgery, if the Court was satisfied on a review of the entire evidence that Kishen Singh had spoken the truth. The circumstances relied upon in the judgment of the learned Sessions Judge are in my opinion very strong reasons in favour of believing Kishen Singh to have spoken the truth. I think the appellant was rightly convicted and I dismiss his appeal.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 351 (2)

RAFIQUE AND LINDSAY, JJ.

*Lakshmi Ram Jani and others—*Defendants—Appellants.

v.

*Hari Ram Dube—*Plaintiff — Respondent.

First Appeal No. 319 of 1916, Decided on 10th March 1919, from decree of Addl. Sub-Judge, Banares, D/- 13th June 1916.

(a) Limitation Act (9 of 1908), Art. 60—
Deposit in, nature of banking deposit —
Art. 60 applies to suit to recover deposit.

Where a deposit is in the nature of a banking deposit the depositor stands in a fiduciary relation to the depositor, and a suit to recover such deposit is governed by Art. 60. [P 353 C 1, 2]

* (b) Hindu law — Applicability—Nagar Brahmins of Gujarat domiciled in Benares ignorant of Mayukha rules — Mitakhshara held governed family.

Where a family of Nagar Brahmins of Gujarat was domiciled for over a century in Benares, and it was found that they were ignorant of any rules to be found in the Mayukha commentary and were unable to depose to a single instance of special succession under that commentary;

Held: that the family was governed by the Mitakshara law which prevailed in Benares.

[P 354 C 1]

Gokul Prasad, Baldeo Ram Radhakant Malaviya—for Appellants.

Sarat Chandra Chaudhuri — for Respondent.

Judgment.— The defendants in the suit out of which this appeal has arisen are the sons and grandsons of one Gulab Ram Jani, who died in the year 1958 Sambat corresponding to 1901-1902. The plaintiff is the daughter's son of Gulab Ram Jani, by the latter's daughter Gopi Kuar, who died in the lifetime of her father. Gulab Ram's wife was a lady whose name was Ballabh Kuar. The family to which the parties belonged is a family of Nagar Brahmins, who came originally from Gujarat and settled in Benares some 150 or 200 years ago. The suit was brought for the purpose of recovering a sum of Rs. 9,567-8-9. This sum is made up of four items which are exhibited in the statement of account attached to the plaint. The first item is one for Rs. 3,791-14-0 said to have been deposited with the firm of the defendants by Ballabh Kuar; the second item is a sum of Rs. 2,207 said to have been similarly deposited by Mt. Gopi Kuar; the third item of Rs. 533 is also alleged to have been deposited by Gopi Kuar and the fourth item of Rs. 2,500 is said to have been deposited by the plaintiff himself. The cause of action stated in the plaint was that the plaintiff in the month of January 1914 had demanded payment of these deposits which had been refused. The claim therefore was for the total sum of these items together with interest, the aggregate amount being as above stated Rs. 9,567-8-9. A number of pleas were raised for the defence. First of all it was stated that the item alleged to have been deposited by Ballabh Kuar had

been deposited by Gulab Ram Jani himself in her name by way of a trust fund from which were to be defrayed certain expenses for shraddh. With regard to items 3 and 4, the case for the defendants was that Gulab Ram Jani before his death had placed these sums to the credit of Gopi Kuar and the plaintiff by way of favour and for their maintenance. It was pleaded that there was no consideration for these deposits which had been made by way of charity and that the plaintiff was not entitled to recover them. As to the second item it was admitted that Gopi Kuar had deposited Rs. 2,207 with the defendants' firm, but it was pleaded that on this account there was a debit against the plaintiff of Rupees 2,621-15-0. Further pleas to be noticed are:

(1) That Gopi Kuar, the mother of the plaintiff, was not the daughter of Ballabh Kuar but of another wife of Gulab Ram Jani; (2) that the suit was barred by reason of certain arbitration proceedings which had taken place before the claim was brought; (3) that the claim was barred by limitation; and (4) that in any case so far as the first item was concerned; the right of the plaintiff was to be determined with reference to the Mayukha and not the Mitakshara law. The lower Court found that the first item in dispute was the stridhan of Mt. Ballabh Kuar. The learned Subordinate Judge held that the defence had failed to prove that this money constituted a trust fund for the purposes of meeting the expenses of shraddh. He next held that the arbitration proceedings upon which the defendants relied, were no bar to the suit inasmuch as the plaintiff had been no party to the reference to arbitration. The Subordinate Judge held also that Gopi Kuar was the daughter of Ballabh Kuar. As regards the two deposits of Rs. 533 and Rs. 2,500, items 3 and 4, the finding of that Court was that Gulab Ram himself had made these deposits but that they had been made for the benefit of Gopi Kuar and her son and therefore the plaintiff was entitled to get them. With reference to the second item, namely, the deposit of Rs. 2,207, the Subordinate Judge found that this money had been put in deposit by Gopi Kuar but that there was owing to the defendants on this account a still larger sum, namely, Rs. 2,621-15-0. On the issue of

limitation, the Subordinate Judge found that the suit was not time-barred and lastly he held that the Mitakshara law governed the relations of the parties. He gave a decree therefore to the plaintiff for Rs. 6,409-15-0 with proportionate costs and interest pendente lite and future at the rate of five annas four pies per cent per mensem.

Pausing here it may be observed that on the face of it, the decree of the lower Court is wrong. The Subordinate Judge was of opinion that items 1, 2 and 4 carried interest and yet in making up the account between the parties he has not allowed interest on these sums up till the date of suit. The defendants come here in appeal and two pleas have been raised on their behalf. The first plea is contained in the first and second grounds set out in the memorandum of appeal, that is the plea of limitation. The third and fourth grounds relate to the law applicable to the parties, the contention being that the family is governed by Mayukha and not by the Mitakshara law. The plaintiff's case is that the Court below ought to have decreed his claim in full. He objects to the finding of the Court below that there was against him a debit balance of Rs. 2,621-15-0 and says that this sum ought not to have been deducted from his claim. To deal first with the appeal, it may be observed that there is no longer any dispute about the various items mentioned in the plaint which were received in deposit by the defendants' firm. The case which was set up in the Court below regarding the first item, that is to say, the deposit made in the name of Mt. Ballabh Kuar has not been argued here. It is no longer contended that this item was placed with the defendants in trust for the performance of shraddh ceremonies. We may take it therefore that each of the items in the account represents a separate deposit and this being so, the issue about limitation is disposed of at once. We think the lower Court is right in holding that the suit was not time-barred. The Article which applies is obviously Art. 60, Sch. 1, Lim Act, and time begins to run from the date on which demand was made, that is to say, in the present case from 16th January 1914. The suit was filed a few months later. The deposits were in the nature of banking deposits and the defendants stand in a fiduciary

relation to the plaintiff. For these reasons the case falls within the purview of Art. 60, and not of Art. 62 as was pointed by the counsel for the appellant.

As to the question whether the parties are governed by the Mitakshara or the Mayukha law we have already mentioned that this point arises only in connexion with the first item in dispute. On the finding of the Court below this sum of Rs. 3,791-14-0 was the stridhan of Ballabh Kuar. If this is a case which is governed by the Mitakshara law, the whole of this sum was inherited by her daughter Gopi Kuar and is now claimable by the plaintiff as the heir of his mother. On the other hand if the Mayukha law is to be applied the stridhan of Ballabh Kuar was divisible between her sons and her daughters. A number of witnesses were examined in the Court below for the purpose of showing which school of law governs the relations of the parties. We have been referred to the statements of six witnesses who were examined on behalf of the plaintiff. There was also a deposition given in a former suit by Ravi Ram who was one of the sons of Gulab Ram Jani. Read as a whole the evidence is not of very much value for most of it proceeds from witnesses who admit their ignorance of the differences between the Mayukha and the Mitakshara law. However so much is established from the testimony of these witnesses that the family is a family of Gujarati Brahmins who migrated to Benares 150 or 200 years ago. Ravi Ram when examined in the earlier suit deposed that the family first migrated from Gujarat to Jaipur and came from Jaipur to Benares about the year 1804 A. D.

The argument for the appellants is that as the parties are Gujaratis they must be deemed to have brought their own law with them and that law must have been the law as laid down in the Mayukha. On the other hand the contention is that the presumption must be in favour of the application of the Mitakshara law because it is said that the commentary which goes by the name of the Vyavahara Mayukha did not make its appearance till after the year 1600 A. D. On the authority of the books there seems to be no doubt that the author of this commentary, Nilkantha, lived about the year 1600 A. D. in Benares and his

works are said to have come into vogue about the year 1700 A. D. Support for this argument is derived from the history of the Mayukha as set out in West and Buhler's Hindu Law, Vol. 1, p. 19 (Edn. 3rd), in which the statement of Borradaile is quoted as authority for the history given. It seems to us that it would be very difficult to say that a family which migrated from Gujarat nearly two centuries ago is governed by the special rules of inheritance which are set out in Nilkantha's commentary. The question whether the Mayukha is the governing authority in Gujarat is one which does not appear to have been definitely settled although the view taken by the Bombay High Court seems to be that the Mayukha is the principal authority in that province. This view however has been challenged in a work which was cited before us at the time of the argument "Codification in British India" by Bijoy Kishore Acharya (Tagore Law Lectures, 1912) at p. 345 and the following pages. The learned author points out that the Court of highest jurisdiction in Baroda holds that the Mayukha is not of superior authority to the Mitakshara in the region of Gujarat.

On the evidence before us we are of opinion that the Mitakshara ought to be applied here. The family has long been domiciled in Benares where the Mitakshara law prevails and such evidence as there is before us shows that these people are ignorant of any rules to be found in the Mayukha commentary. No instance of special succession under the Mayukha has been deposed to by any of the witnesses, and this is a fact of some significance for the family is a big one and instances might have been expected to be forthcoming if the Mayukha law applied. On the two points raised in the memorandum of appeal, we find against the appellants and the appeal fails accordingly. Coming now to the cross-objection which relates to a sum of Rs. 2,621-15-0, which the Subordinate Judge debited against the plaintiff it appears to us that the lower Court has not dealt correctly with this matter. The Subordinate Judge for some reason or other which is not apparent treats this sum as a debit, against the deposit account of Rs. 2,207, standing in the name of Gopi Kuar. On the other hand, it is the case of the defendants

that all the items which go to make up this debit total were items advanced to or chargeable against the plaintiff and if this be so, the debit account should have been made up against the deposit of Rs. 2,500, which stands in the plaintiff's name.

The sum of Rs. 2,621-15-0 claimed by the defendants is made up of three items:

(1) Rs. 811-9-0 debited to the plaintiff up till Kartik 1957 Sambat, that is to a date prior to the death of Gulab Ram Jani. (2) Rs. 984-6-0, representing sums paid to the plaintiff since the death of Gulab Ram Jani. (3) Rs. 826, debited to the plaintiff on account of interest. There has been much argument before us regarding the account of the defendants which relates to this debit item. In order to support their claim the defendants produced an account which purports to date from 1941 Sambat at a time when the plaintiff can only have been about 16 years of age. This date (1941 Sambat) was 17 years prior to the death of Gulab Ram Jani. The account so produced is not the account from the very beginning, for it opens with a credit item of Rs. 678-6-0 in favour of Hari Ram carried over from an earlier account. By the end of 1949 Sambat this account had become a debit account and has been shown as such ever since. At the time of Gulab Ram's death the debit against Hari Ram is shown as amounting to Rs. 811-9-0.

It is proved beyond all doubt that when Gulab Ram died, he directed a sum of Rs. 2,000 to be placed to the credit of Hari Ram in addition to a sum of Rs. 500 which had been credited previously, and we think that there is good ground for supposing that it was the intention of Gulab Ram Jani in giving these directions to wipe out the debt which was then standing against the name of Hari Ram. This debit seems to have arisen by reason of Gulab Ram's himself paying sums to Hari Ram from time to time for his support and consequently when we find that Gulab Ram Jani just before his death left Rs. 2,500 for the support of his grandson, we think he intended this to be a fresh fund not subject to deduction in respect of any money which had been previously advanced. We may mention here that the award of the arbitrators, who were appointed to

make partition of the family business which belonged to the defendants, is upon the record. The accounts were examined by persons who were more or less experts and we find that the arbitrators in making up this account of Hari Ram took the same line as we are taking now. We are satisfied, therefore, that this debit item of Rs. 811-9-0, which was standing against the name of the plaintiff when Gulab Ram Jani died, should be excluded from the account.

Next we have to take the account from the time when Gulab Ram Jani died, starting with the fact that there was an opening of a credit balance of Rs. 2,500 in favour of the plaintiff. At the hearing of the appeal an extract was prepared from the account books of the defendants which is supported by an affidavit, and according to this extract there have been paid to the plaintiff since the death of Gulab Ram Jani sums the total amount of which comes to Rs. 1,795-0-0. No interest is included in this sum. The learned counsel for the respondent objected to one item in this account, namely, a charge of Rs. 891-8-0 said to represent money advanced to the plaintiff for certain marriage expenses. It was argued that this sum ought not to be debited in the account but ought to be treated as gift from the family business. In our opinion this contention cannot be maintained, for we are of opinion that any sums which were paid to the plaintiff after Gulab Ram Jani's death must, in view of what we have already said, be a charge against the plaintiff's account. There was no reason whatever why these defendants should have made a present of this sum of money to the plaintiff. Over and above this sum of Rs. 1,795-4-0 there is another item of Rs. 131 which represents not money actually paid to the plaintiff, but debited to his account in the year 1964 Sambat. The history of this transaction appears to be that the plaintiff's father had pawned certain ornaments with the firm for Rs. 131. It is said that in 1964 Sambat the plaintiff was given the ornaments upon his agreeing to have the debt transferred to his own account. We think this is a reasonable and proper explanation of this item and we hold that it constitutes a proper debit against the plaintiff. We find, therefore, that the total sum which is properly chargeable against the plain-

tiff's deposit account of Rs. 2,500 is Rs. 1,926-4-0.

As to the item of interest, namely, Rs. 826 to which we have previously referred, we leave that out of consideration altogether. The item includes certain entries which accrued due before the death of Gulab Ram Jani and for the reasons we have already given, no debit of a date prior to 1958 Sambat can be charged against the plaintiff. On the other hand, it is quite clear that since Gulab Ram Jani's death the account of the plaintiff, which began with a credit balance of Rs. 2,500 carrying interest at Rs. 4 per cent. per annum, has always been a credit account and consequently the defendants are not entitled to charge interest as if the account had been overdrawn. The lower Court has, as we have said, debited the plaintiff with Rs. 2,621-15-0. Our finding is that the proper debit is Rs. 1,926-4-0 and so the cross-objection must be allowed to the extent of Rs. 695-11-0. We have already mentioned in an earlier part of the judgment that the decree of the Court below on the face of it is incorrect, inasmuch as the Subordinate Judge has not allowed interest in the decree although he finds in his judgment that interest was claimable in respect of items Nos. 1, 2 and 4. The correct amount owing to the plaintiff is Rs. 7,641-4-9 and we vary the decree of the Court below accordingly.

A decree will be prepared for this sum with proportionate costs and interest during the suit and future interest at the rate of Rs. 4 per cent. per annum. The result, therefore, is that the appeal fails and is dismissed with costs, which will include in this Court fees on the higher scale. The cross-objection is allowed with proportionate costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 355

RICHARDS, C. J. AND BANERJI, J.

Sundar Pande and others—Applicant.

v.

Mt. Kumari—Opposite Party.

Application in First Appeal No. 228 of 1916, Decided on 5th December 1918, from decree of Addl. Sub.-Judge, Gorakhpur.

Civil P. C. (1908), O. 22, Rr. 4 and 11—Death of sole plaintiff-respondent pending appeal—Legal representatives not brought on

record—Suit is not abated—Proper order is to strike off appeal.

Where during the pendency of an appeal the sole plaintiff-respondent died and the defendants-appellants, who claimed to be her legal representatives, applied for an order that the suit had abated:

Held: (1) that a decree having already been made in favour of the plaintiff before her death, the Court had no power to declare that the suit as distinct from the appeal had abated; (2) that under the circumstances of the case the proper order was that the appeal be struck off the file of pending cases. [P 356 C 2]

Surendra Nath Sen and Jang Bahadur Lal—for Applicant.

Ibn-i-Ahmad and Shakir Ali—for Opposite Party.

Judgment.—This is an application made in First Appeal No. 228 of 1916. The Court is asked to make a declaration that the suit has abated. The circumstances as stated by the learned advocate on behalf of the appellant are as follows: The title of the plaintiff in the suit was that the property was the stridhan of her stepmother, Mt. Moti Rani, and that she inherited the property upon the death of this lady. She consequently asked for a declaration of her title and possession. The defendant preferred this appeal. During its pendency the sole plaintiff died. The appellant now contends that even on the assumption that the deceased plaintiff inherited the property from her stepmother, who held it as stridhan, upon the death of the plaintiff the property passes to the next heirs of Mt. Moti Rani's husband, the plaintiff only having a life-interest. In support of this contention he refers to the Privy Council ruling in *Sheo Shanker Lal v. Debi Sahai* (1) and also the case of *Sheo Partap Bahadur Singh v. Allahabad Bank* (2). It would appear that, assuming the facts stated to be correct, the title of the deceased plaintiff came to an end with her death, and that the only persons who could now carry on the suit would be the reversioners to Mt. Moti Rani's husband who the defendants themselves claim to be. Notice of this application has been served on the husband of the deceased plaintiff. He does not appear to show cause, nor has he made any application to be brought on to the record in the place of his deceased wife.

(1) [1903] 25 All. 468=30 I. A. 202=8 Sar. 465 (P. C.).

(2) [1903] 25 All. 476=30 I. A. 29=8 Sar. 535 (P. C.).

We do not think however that we have any power to declare that the suit has abated. O. 22, R. 4, provides that where a sole defendant dies and the right to sue survives, the Court upon an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Sub-Cl. (3) of the same rule provides that where within the time limited by law no application is made under sub-R. (1) the suit shall abate as against the deceased defendant. Applying R. 11 we must substitute in R. 4 the word "respondent" for "defendant" and the word "appeal" for "suit." In sub-Cl. 3 again the word "appeal" must be substituted for the word "suit." We do not think that under this rule we have any power to declare that a suit as distinct from an appeal has abated in a case in which there has been a decree already made before the death took place. As we have stated above however it would appear that if the facts stated to us be correct, it would now be impossible for any one to execute the decree obtained by the deceased plaintiff. We think that under the circumstances all we can do is to direct that having regard to the events which have happened, the appeal should be struck out of the file of pending cases. As explained by what we have said above, we reject the application.

V.B./R.K.

Application rejected.

A. I. R. 1919 Allahabad 356

TUDBALL, J.

Ram Sahai and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 611 of 1918, Decided on 7th September 1918.

Criminal P. C. (1898), Ss. 195 and 476—Proceedings under S. 476 initiated—Subsequent application under S. 195 for sanction to prosecute by third person—Duty of Court indicated.

Where a Court initiates proceedings under S. 476, a subsequent application by a private person for sanction to prosecute the accused is no justification for dropping the proceedings under S. 476 and in substitution granting sanction to prosecute. The Magistrate ought to decide for himself whether or not the case is a fit one in which to lay a complaint. It is not usually advisable to grant sanction to a private person.

[P 357 C 1]

A. S. Osborne, Satya Chandra Mukerji and Girdari Lal Agarwala—for Applicants.

E. A. Howard—for the Crown.

Judgment.—The facts of this case are briefly as follows:—A criminal complaint was preferred against certain persons in which the latter were charged with an offence under S. 453, I. P. C. The Court acquitted the accused, came to the conclusion that the charge was a false one and proceeded to take action under S. 476, of the Code, apparently with the approval of the Magistrate. Rup Ram, who was one of the accused, applied for sanction to prosecute the other side for offences under Ss. 211 and 193, on which the Magistrate dropped his proceedings under S. 476, because, as he says, under the circumstances it was useless to make Government responsible for conducting the case against these persons and incur heavy expenditure. In substitution of the proceedings which he had initiated, the Magistrate granted Rup Ram sanction to prosecute, thereby placing in his hands an effective weapon as against those who had charged him with the original offence. I have examined the record. To my mind it is plain that the Magistrate's action is unsuitable to the circumstances of the case. The grounds that he has given for dropping proceedings under S. 476, are childish in the extreme. It is not usually advisable to grant sanction to a private person. It is far better in my opinion that the Magistrate should take action under S. 476, and decide for himself whether or not it was a fit case in which to lay his complaint. Government is not so poverty-stricken that it cannot bear the expense of prosecuting these persons, if necessary. The District Magistrate on appeal held that there was no sufficient reason to interfere with the order granting sanction. In my opinion there is every reason for interference. I set aside the sanction granted by the original Court. I direct the record to be returned to that Court for it to take up proceedings under S. 476, at the stage at which it dropped them, if it shall think fit to do so. The prosecution of the present appellants must not be left in the hands of Rup Ram or any other private person.

V.B./R.K.

Record returned.

A. I. R. 1919 Allahabad 357

KNOX, J.

Sakhawat Ali—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 757 of 1918, Decided on 13th December 1918, from an order of First Class Magistrate, Basti, D/- 7th September 1918.

(a) Criminal P. C. (1898), Ss. 145, 435 and Ch. 12—Proceedings under Ch. 12 cannot be called up by High Court under S. 435.

Proceedings under Ch. 12 are not proceedings within the meaning of S. 435 of the Code and cannot therefore be called up by the High Court under that section. [P 358 C 1]

(b) Criminal P. C. (1898), S. 145—Proceedings under Ch. 12—High Court cannot revise under Government of India Act, S. 107.

Semble.—The High Court has no power under S. 107, Government of India Act, to revise proceedings taken under Ch. 12, Criminal P. C.

[P 358 C 2]

S. M. Sulaiman—for Applicant.

Iqbal Ahmad—for the Crown.

Judgment.—Early in November last an application was presented to a learned Judge of this Court which is described as being a criminal revision against the order of M. Mumtaz-ul-lah Khan, First Class Magistrate, Basti, dated 7th September 1918, charge under S. 145, Criminal P. C. It is subdivided into three heads. The first is: Because there being no order showing that the learned Magistrate was satisfied that a dispute likely to cause a breach of the peace exists and he not having made any order in writing stating the grounds of his being so satisfied, the whole proceeding was without jurisdiction and the order is ultra vires. I need not, at any rate at present, go into the second and third grounds set out in this application. The application is endorsed by an order of this Court which runs as follows:

"I admit this under S. 107, Government of India Act. Let notice go to show cause whether proceedings were taken and order made without jurisdiction."

In pursuance of this order a notice went to the other party Shukr-ul-lah and also to the Magistrate whose order was attacked. They were told that the case would be heard and they were informed that they might show cause accordingly. The point then that I have to consider is whether the proceedings taken before or by the Magistrate and the order made by him were or were not without jurisdiction. The reason for this order being passed is, no doubt, on ac-

count of what is stated in S. 435, Cl. 3, Criminal P. C. It must be remembered that that clause sets out that proceedings under Ch. 12 are not proceedings within the meaning of S. 435. I know of no section in the Criminal Procedure Code, other than S. 435, and none other has been pointed out to me, whereby this Court can call for records of subordinate criminal Courts. S. 195 of the Code may indirectly give this power, but the case before me is not one under S. 195 of the Code and it has been laid down by this Court more than once that proceedings under Ch. 12 are not proceedings which can be called up by S. 435, Criminal P. C. To this matter I shall again refer.

But if the case is as stated by me, then this Court has no power under S. 435 to call up any proceedings under Ch. 12. The learned counsel who appears for the applicant seems to have felt this obstacle in his path, and to have in consequence moved the learned Judge of this Court to call up the proceedings under Ch. 12 by virtue of what he appears to have stated as being an enabling power that this Court has in this direction under S. 107, Government of India Act, 1915. I find some difficulty in following the line or course taken by him. S. 107 cited above is either a section consolidating the existing procedure or it is a new section creating some new jurisdiction or conferring some new powers. I will look at it from both sides. The powers vested in this High Court of Judicature, at the time the Government of India Act of 1915, commenced, are set out in S. 29 of the Letters Patent under date 17th March, 29 Victoria. According to that the proceedings in all criminal cases other than criminal cases which shall be brought before this High Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the Code of Criminal Procedure prescribed by an Act of the Governor-General in Council and being Act 25 of 1861 or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid. The present case does not fall under the latter class of cases, viz., cases brought before this Court in the exercise of its ordinary original criminal jurisdiction. Act 25 of 1861 has been repealed, and has been replaced by Act 5 of 1898. If S. 107 is some new section conferring new powers

or extending powers, then it is subject to what is known as the rule of strict construction [See Maxwell on Interpretation of Statutes, 5th Edn, p. 475. See also *Flower v. Lloyd* (1).] The remarks made by Lord Justice James appear to me to have a strong bearing upon the case before me, and upon the power of this Court to entertain motions of this kind. I have a still further difficulty in understanding how S. 107 can, in any way, apply to the present application. Looking to the language of S. 107 I find that this Court has superintendence over all Courts subordinate to its appellate jurisdiction and that it may do certain things, namely call for returns, direct transfer of suits and appeals, make and issue general rules regulating the practice and proceedings of inferior Courts, prescribe forms in which books, entries, etc., are to be kept in the offices of the inferior Courts, and settle table of fees.

The application before me certainly does not fall under returns nor under transfer of suits. Even if it does fall under rules, forms and tables, which is open to doubt, such rules, forms and tables must not be inconsistent with the provisions of any Act for the time being in force, let us say Act 5 of 1898 for instance, and must have the previous approval of the Local Government. I know of no rules bearing upon Ch. 12 which have been issued by this Court and none such has been pointed out to me. I am then forced back upon the conclusion that if any power such as that claimed exists anywhere it exists in S. 29, Letters Patent, and, as I have already said, I have not been satisfied that any such power exists under this section. In the case of *Ananda Chandra Bhattacharjee v. Carr Stephen* (2) this point was raised. In fact, Pethe-ram, C. J., says regarding it in his judgment that the point most pressed in the appeal was that the Court had no jurisdiction to interfere with this order at all on the ground that orders made under S. 144 are, by the last clause of S. 435, exempted from the operation of that section. His reply to this was divided into two sections. First, the mere statement that an order is made under S. 144, if it is not such an order as is contemplated by the section and could not be made

(1) [1877] 6 Ch. D. 297=46 L. J. Ch. 838=37 L. T. 419=25 W. R. 793.

(2) [1892] 19 Cal. 127.

under it, does not make it an order under that section.

The second was that under S. 439 the Court has the general power of revision of all orders made by inferior criminal Courts which come before it in any way whatsoever, and it is clear that this Court, under Cl. 15 of the Charter, has a general power of superintendence and under that power can send for any record which it may desire to see. He also added that the Court has power to interfere under the Charter Act if the proceeding of a Magistrate is ultra vires and could not be made under S. 144. He pointed out that this had been accepted in the Calcutta Court for a great many years, both under S. 144 of the present Code and S. 518 of the old Code. He added a list of decisions to that effect with which the Court deciding that case agreed. With every respect to the Calcutta Court in this matter, it appears to me that sufficient consideration was not given to the words of S. 435. If we read S. 435 as a whole, it seems to amount to this. The High Court may call for and examine the record of any proceeding, proceedings under Ch. 12, etc., being excepted, for the purpose of satisfying itself as to the legality or propriety of the finding, etc., and as to the regularity of any proceedings of the inferior Courts other than proceedings under Ch. 12, Criminal P. C. When read in this light the difficulty of calling for records or proceedings under Ch. 12 again crops up and I am face to face with the same difficulty that I had on which I pronounced my judgment in *Jhingai Singh v. Ram Partap* (3). But I need not go further into this matter, for I have already dealt with it at length in previous decisions, except to add that in *Sundar Nath v. Emperor* (4), the view was maintained by another Judge of the Court that under the circumstances the Court cannot send for records.

There is one case which calls for consideration and that is the case of *Girdhari Singh v. Hurdeo Narain Singh* (5), in which the Privy Council upheld the High Court of Bengal in a decision arrived at by that Court upon an appli-

cation under S. 15 of the Charter Act. The Privy Council (see page 238) there said of a Subordinate Judge whose procedure was impugned that:

"it was competent to the High Court, by a proceeding in the nature of mandamus, to order the lower Court to do that which it ought to have done, namely, having rejected the objections to the sale, to confirm it; and the High Court proceeded upon that section and made the order. But the High Court did not merely treat the judgment of the Subordinate Judge . . . as a nullity; they entered into the question as to whether the objections to the sale were valid or not valid. In fact, they treated the case in their decision as if the lower Court had actually confirmed the sale, and there had been an appeal to them—against the confirmation. Their Lordships think that they may look at the case now in the way in which the Judges looked at it then."

The Privy Council then went into the merits and upheld the High Court and recognized that the duty of the High Court on such applications is to look into the merits and make a final order. With reference to this decision by which of course I am bound, it must be noted that the decision refers to the civil jurisdiction of the Court and not to the criminal. S. 9 appears to give wider powers. I now turn to the arguments by which the learned counsel for Saiyid Sakhawat Ali sought to support his application. Before me he put in an affidavit to which I have already referred. This affidavit says that the person swearing to it personally inspected the record of the S. 145 proceedings and found that the very first order passed by the learned Magistrate was that of the 14th February 1918, of which he had obtained a certified copy. If that paper be read as it stands, it is open to attack in that it makes no specific mention of the Magistrate having been satisfied that a dispute likely to cause a breach of the peace existed. The learned vakil for Shukr-ul-lah on the other hand points out that this copy is only part of the Magistrate's order and that the whole order if read is conclusive that the Magistrate had not only been satisfied but in his order had stated that he was satisfied. I find he is right. The net result is that so far as has been shown, the Magistrate had jurisdiction to hold this enquiry and was properly seised of the case. The case is one which is entirely in conformity with the case of *Syed Khatun v. Lal Singh* (6). This Court has

(3) [1909] 31 All. 150=1 I. C. 762=6 A. L. J. 113=9 Cr. L. J. 332.

(4) [1918] 40 All. 364=44 I. C. 673.

(5) [1876] 3 I. A. 230.

(6) A. I. R. 1914 All. 71=36 All. 233=25 I. C. 324.

no jurisdiction to interfere and the application is dismissed. I wish to add that I am much indebted to the counsel on either side for their careful and elaborate arguments. I have not gone into those arguments at greater length because, as I say, I hold that I have no jurisdiction to interfere in this case. The following cases were cited to me and I add them here by way of reference.

For Applicant:—*Bihari Lal v. Chhajja* (7), *Dhan Pershad v. Ganesh* (8), *Jhengar v. Baij Nath* (9), *Ram Lochan v. Emperor* (10), *Nathu Ram v. Emperor* (11) and *Sheorani v. Baij Nath* (12).

For Opposite Party:—*Debi Prdsad v. Sheodat Rai* (13), *Jhingai Singh v. Ram Partap* (3), *Syedu Khatun v. Lal Singh* (6), *Har Prasad v. Pandurang* (14), *Goluck Chandra v. Kali Charan* (15), *Matukdhari Singh v. Jaisari* (16) and *Chinnappudayan, In the matter of* (17). Nowhere throughout the case was any allegation ever raised by the applicants that they had been prejudiced, although the case was argued for a month and a mass of evidence taken.

V.B./R.K. *Application dismissed.*

- (7) [1904] 2 A. L. J. 272=2 Cr. L. J. 222.
- (8) [1913] 20 I. C. 751=11 A. L. J. 696=14 Cr. L. J. 495.
- (9) [1913] 19 I. C. 709=11 A. L. J. 586=14 Cr. L. J. 277.
- (10) A. I. R. 1914 All. 62=36 All. 143=22 I. C. 171.
- (11) [1917] 39 I. C. 701=15 A. L. J. 270=18 Cr. L. J. 557.
- (12) [1916] 33 I. C. 625=14 A. L. J. 146=17 Cr. L. J. 145.
- (13) [1907] 30 All. 41.
- (14) [1905] A. W. N. 260=3 Cr. L. J. 48.
- (15) [1886] 13 C. 175.
- (16) [1917] 41 I. C. 652=15 A. L. J. 576=39 All. 612=18 Cr. L. J. 828.
- (17) [1907] 30 Mad. 548=3 M. L. T. 18=7 Cr. J. J. 28.

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TUDBALL AND ABDUL RAOOF, JJ.

Secy. of State and another—Defendants
—Appellants.

v.

Qamar Ali—Plaintiff—Respondent.

First Appeal No. 213 of 1916, Decided on 17th May 1918.

(a) Land Acquisition Act (1894), S. 50—Proceedings on behalf of Municipal Board—Board cannot withdraw from acquisition—Government alone can do so.

Where proceedings under the Land Acquisition Act are taken on behalf of a Municipal Board, the Board has no power to withdraw from the acquisition. It is the Government alone that can withdraw from the proceedings. [P 363 C 2]

(b) Land Acquisition Act (1894), S. 9—Publication of notification for acquisition—Owner investing more capital does so at his own risk.

Where after the publication of a notification for acquisition of certain land the owner of the land invests more capital in it, he does so at his own risk. [P 364 C 1]

(c) Land Acquisition Act (1894), S. 48—Delay.

Mere delay in completing the acquisition of a piece of land does not invalidate the proceedings. [P 364 C 2]

(d) Land Acquisition Act (1894), S. 9 (3)—Collector wilfully abstaining from giving notice under S. 9 (3)—Proceedings are inoperative in vesting land in Government—Notice not served through inadvertence—Proceedings are not invalid.

Where in acquisition proceedings the Collector wilfully and perversely abstains from giving the necessary notice to the owner of the land under S. 9 (3) his proceedings cannot be considered bona fide and are inoperative in vesting the land in Government; but where through mere inadvertence or mistake, a person interested has not had notice served upon him the proceedings are not thereby invalidated. [P 365 C 1, 2]

(e) Land Acquisition Act (1894) S. 18—Proceedings resulting in award are administrative and not judicial—For judicial ascertainment of value owner should move Collector to refer matter to Court under S. 18.

Proceedings under the Land Acquisition Act resulting in an award are administrative and not judicial, and the award in which the enquiry results is merely a decision, binding only on the Collector, as to what sum shall be tendered to the owner of the lands, and if judicial ascertainment of the value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court under S. 18, of the Act. [P 365 1 C1]

(f) Land Acquisition Act (1894), Ss. 9, 12 and 18—Owner of land, not entered in Khewat as such—Notice under S. 9 (3) served only to persons entered as owners in Khewat—Real owner claimed compensation on award being made—Amount put to his credit in Treasury—Notice under S. 12 (2) not served on owner and no application under S. 18 made by him—Suit by owner for declaration that proceedings were null and void for want of proper notice held not maintainable.

The plaintiff who was the owner of a plot of land, was not entered in the khewat as such. Proceedings having been taken under the Land Acquisition Act for the acquisition of the plot, the Collector gave the notice required by S. 9 (3) of the Act to the persons entered in the khewat as the owners of the plot, but no notice was given to the plaintiff. When the award was made, however the plaintiff filed a petition of objection that the compensation should be paid to him and not to the recorded owners of the plot; and the amount of the compensation was, consequently, put to his credit in the Treasury. No notice had been given to him under S. 12 (2) of the Act, and he made no application under S. 18 for a reference to the Court. He subsequently brought a suit for a declaration that the acquisition proceedings were null and void for want of proper notices, etc.

Held: that the suit was not maintainable and that the plaintiff should have availed himself of the procedure laid down in S. 18, Land Acquisition Act. [P 366 C 1]

A. E. Ryves—for Appellants.

S. M. Sulaiman—for Respondent.

Judgment.—The facts of the present case are hardly in dispute, and are as follows: In Mauza Udaipur Khas, Pargana and Tahsil of Bareilly, there were three plots of land recorded as Nos. 42/1, 42/2 and 43 (para. 1 of the plaint). These belonged to two persons, Imdad Husain and Altaf Husain. In 1907 these persons sold these plots to the plaintiff Qamar Ali, a practising lawyer, living at Bareilly. It may be as well to point out here that Udaipur Khas is on the outskirts of Bareilly city. Qamar Ali, though a lawyer, and presumably well aware of the existence of Revenue Records and the duty imposed on a transferee of having his name duly recorded as the owner, did not apply for mutation of names at once. Subsequently, Imdad Husain sold his share, together with other property, to his wife Ahmadi Begam. She applied for and obtained mutation of names as against a half share. After this Qamar Ali applied for mutation of names in respect to the whole, as against his transferors. As their names then stood recorded against part only of the property, the Revenue Court directed his name to be recorded in the Record of Rights as against that half only. The result was that in the public records two Khatahs were recorded: No. 22 against the name of Ahmadi Begam. No. 23 against the name of Qamar Ali. Qamar Ali seems to have remained in possession and to have planted, some trees. It may also be accepted that the boundary marks between the plots were obliterated. It also appears that some scheme was proposed for the extension and improvement of Bareilly city, for which purpose it was necessary to take up and acquire a large area of land. The Local Government for this purpose notified a large area, under the Land Acquisition Act for compulsory acquisition. This was done in 1910 and in this area was included the land mentioned above, which is the subject matter of the present suit. The area was large and the owners numerous and the actual acquisition and making of awards under the Act was spread over a considerable time, and the

turn of the plots mentioned above did not come until 1912. Their acquisition was carried out in two parts. Action was first taken in respect to Khata No. 22.

Here it is necessary to state another fact. Many owners of lands were prepared to build houses upon them so as to further the object of the Municipal Board and carry out the scheme. The Land Acquisition Officer, who was acting on behalf of Government in the acquisition proceedings, consulted the Board and took action in respect of those plots (within the area notified) which the Board settled to be necessary for their scheme and which had therefore to be acquired. In respect to the lands of those owners who agreed to build and help in the scheme, the Board asked the officer not to acquire them and in regard to them, apparently, no action was taken. In regard to Khata No. 22 action was taken under S. 9 by issue of notice to those persons whose names were in the Khewat. Special notices were issued to them by order dated 22nd February 1912. Whether the public notice in respect thereto as required by S. 9 (1) of the Act, was ever issued it is impossible to say. Apparently, no trace of it can be found.

It is admitted that no notice was issued to Qamar Ali as his name was not in the Khewat. The 9th March 1912 was the date fixed in the special notices and on that date an award was made by the Special Officer. Here we note that it was very positively alleged on behalf of the plaintiff that no award had been made, but it was found after some trouble upon the acquisition record. The notices issued did not give 15 days' clear time to the persons concerned, but no objection was raised by any of them and the award was made. It was perhaps incomplete in that it did not apportion the total sum awarded amongst those to whom it was deemed payable.

Another point may be noted here. A copy of the village Khasra has been filed showing that certain persons were entered therein as tenants, but no notice was issued to them. In the column of remarks there is a note to the effect that Qamar Ali is in possession. The only person who made any objection was Qamar Ali himself. On 9th March 1912 he filed a petition before the Special Officer, in which he said that he had

heard that compensation was about to be paid to other persons, that this should not be done as he was the owner and therefore the money should not be paid to others but to him. He took no further steps, in spite of the knowledge that he had of the proceedings. He made no application under S. 18 for a reference to the Court, though, as a person interested, he had every right to claim one. No notice under S. 12, Cl. (2), was given to him. He had appeared in person on the date of the award and had filed his petition of objection. The compensation awarded was put in deposit in the Treasury to the credit of Qamar Ali and is still there. One further point must be noted. The amount awarded did not include anything on account of the value of trees, and there appear to be no boundary marks actually in existence marking off the land appertaining to Khata No. 22 from that appertaining to Khata No. 23. In respect to this latter Khata No. 23 steps were taken in July 1912. The public notice and special notice were issued, the latter to Qamar Ali and his recorded tenants for 2nd August 1912. The notice did not allow the full 15 days mentioned in S. 9 (2), the time being short by five days.

Qamar Ali appeared and filed his objections. An award was made. He did not accept it but applied for a reference under S. 18 to the Court, and the reference was duly made and is pending. His objections were filed on 2nd August 1912, and he therein made reference to his petition of 9th March 1912. He was informed of the amount of compensation that stood to his credit in the Treasury, in respect of Khata No. 22, on 26th October, and he filed a petition saying that, for the first time, he had come to know "that day" that compensation had been awarded for a portion of his property (which was clearly untrue). We note here that in July 1912, Qamar Ali became a member of the Municipal Board, having been nominated as a member by Government. This second award (in re Khata No. 23) was made on 14th November. Formal possession of Khata No. 22 was taken by Government on 16th April 1912, and of Khata No. 23 on 20th June 1914. Five days after the last award, Qamar Ali sent a letter to the Chairman of the Municipal Board praying, for certain reasons, that the Board would not take up

his land on condition of his building two bungalows on it.

On 10th January 1913, the Board by a resolution resolved that it would not take up his land. On 24th February 1913, the Chairman informed the special officer of this resolution. The latter through the Collector informed the Commissioner, who addressed the Board pointing out that the land had already been acquired and the Board could not divest itself of property by a mere resolution. The Municipal Board subsequently met and cancelled its resolution of 10th January 1913. Another fact may be noted. While these proceedings were taking place, Qamar Ali sank a well on the land and he did it in the teeth of a protest by the Board (vide the evidence of the Chairman). Qamar Ali brought the suit out of which this appeal has arisen on 1st August 1914, for a declaration that all the proceedings taken for the acquisition of these plots of lands are null and void against him. He withdrew his claim for an injunction. He sued the Secretary of State and the Board.

The case in his plaint was (1) that there was no necessity to acquire his land; (2) that as the land was notified in 1910, it was the duty of the Collector to at once take it up under the Act; (3) that the Collector, the Acquisition Officer and the Municipal Board gave the plaintiff to understand that his land would be exempt from acquisition as he was a proprietor who could build houses upon it; (4) that no steps were taken to acquire the land until July 1912, and this delay, and also the holding out of the hope that the land would not be taken, estopped the Secretary of State from acquiring it under the original notification; (5) that the Board was only taking up the land to be able to sell it at a profit to the Rohilkhand and Kumaon Railway; (6) that various irregularities, set out in para. 8 of the plaint, had taken place in the acquisition proceedings which rendered them null and void and of no force against him; (7) that the Compensation Officer had induced him, by holding out hopes of the non-acquisition of the land, to build a well and collect materials for the building of a house and had then through enmity reported that it should be taken up and therefore the Secretary of State was estopped.

It will be observed that in his plaint the plaintiff ignored the proceedings taken in respect to Khata No. 22. The defendants contested the suit. The Court below has held: (1) that representations generally were made by both the defendants to owners of sites that their lands would not be acquired in cases where the owners could build upon them, and that these representations, combined with the Board's resolution of 10th January 1913, operated as an estoppel and barred the defendants from acquiring the land in suit on the notification issued in 1910; (2) that the delay in the acquisition proceedings did not debar the defendants from acquiring the land; (3) that in respect to Khata No. 22 the irregularities in procedure of the Acquisition Officer and the fact that the plaintiff was no party to them, resulted in their being void and ineffectual as against him and the plaintiff was still the owner of the land thereof; (4) that the fact that a reference before the District Judge was pending was no bar to the present suit.

It has therefore granted the declaration that the acquisition proceedings are null and void. The defendants have appealed. It is urged before us that, though there may have been some errors in procedure in the course of the acquisition proceedings, there has been nothing fraudulent or corrupt; that the plaintiff had full knowledge of them; that in the case of Khata No. 22 he could and ought to have applied for a reference to the District Court where all his objections could have been made and he could have had a judicial decision; that all the proceedings up to the making of the awards are purely administrative and not judicial, and that errors therein, which do not prejudice the plaintiff or prevent him obtaining a judicial determination, are not sufficient to enable the Court to declare them null and void; that in respect to Khata No. 23 a judicial proceeding is now pending where all the plaintiff's pleas will be heard and decided; that compensation for all the trees has actually been awarded to him in the acquisition of this Khata and the plaintiff has therefore no valid grievance; that there has been no withdrawal by Government from the acquisition and that Government alone can so withdraw; that the plaintiff has failed to prove that Government or the Board held out any hopes to him prior to the

acquisition that the land would not be acquired, that it was not until after the awards had been made that the plaintiff approached the Board and the latter passed its resolution of 10th January 1913 that that resolution was subsequently cancelled and that the Board had no power to withdraw from the acquisition and its resolution had no legal effect.

Reliance is placed upon the decisions in *Ezra v. Secy. of State* (1) and *Ganga Ram Marwari v. Secy. of State* (2) and the decision of this Court in F. A. No. 67 of 1915, decided on 10th May 1916. [*Mt. Shahjahan Begam v. Secy. of State* (3).] In regard to the question of estoppel we cannot agree with the Court below. We may assume that the Acquisition Officer did abstain from taking proceedings, at the request of the Board, in the cases of some owners who were willing and able to further the Extension scheme by building on their lands. It is nowhere shown that in the case of the plaintiff any such hope of non-acquisition was held out as a consequence of which he abstained from protecting his rights in the acquisition proceedings or in consequence of which he spent further sums in sinking his well or improving the property. We have the evidence of the Chairman of the Board to show that the plaintiff was warned not to build his well and that he persisted in it in spite of warnings. Moreover, it was not until the second award had been made that the plaintiff approached the Board on 19th November 1912. He was then, and had been a member of the Board himself since July 1912. He may have had hopes in his own mind, but he has utterly failed to prove that any such hopes were held out to him individually. Under the terms of the Act itself, it is Government which was acquiring the land, and Government alone under the Act could withdraw from the acquisition. As a lawyer the plaintiff must have been well aware of this.

When the Board's resolution of 10th January 1913 was passed the acquisition proceedings were ended and there remained only the judicial proceeding before the District Court on the reference made at the plaintiff's own request. The Board had no power to withdraw and the Com-

(1) [1905] 32 Cal. 605=9 C. W. N. 454=1 C. L. J. 227=7 Bom. L. R. 422=2 A. L. J. 771 (P. C.).

(2) [1903] 30 Cal. 576.

(3) [1916] 36 I. C. 265.

missioner of the division at once called the Board's attention to this and the Board rescinded its resolution. It has not been shown that the plaintiff, subsequently to 10th January 1913, so changed his position as to make it inequitable to allow the acquisition of the land without the issue of any fresh notification by Government under the Act. He was not prevented from putting forward his case in full in the District Court. He has not withdrawn from the reference made at his own request to the District Judge in the case of Khata No. 23, and it is not shown by any evidence at all that he abstained in the case of Khata No. 22 from applying for a reference by reason of any action on the part of the Board or the Secretary of State. The acquisition of that khata took place early in 1912. We fail to see that the appellants have been estopped from acquiring the land in pursuance of the original notification of 1910.

Mere delay in the proceedings based on that notification is no ground for holding that there is an estoppel. The proceedings, no doubt, were spread over a long period of time, but there were many owners of different plots to be dealt with. The plaintiff was in possession and enjoyment of the land. He had planted trees upon it and had leased it to tenants, who presumably paid him rent for it. He may have incurred the cost of upkeep, as he would have had to do in any case. If, with knowledge of the notification, he invested more capital in it (which is not shown by any evidence) he did so at his own peril. He was warned not to do so, and he actually did not approach the Board until after both awards had been made and formal possession taken in the case of the first one. The lower Court seems to think that it will be hard on the plaintiff as he had invested money in planting his trees before the notification and that they have so far given him no return, but this is a point which the District Judge, no doubt, will consider when he, in the judicial proceeding, comes to assess the compensation and work out the market-value. The question of the compensation for all the trees is now before that Court, the award of the Acquisition Officer having included the value of them all in the case of Khata No. 23. We cannot agree with the Court below that there was substantial withdrawal from the acqui-

sition by both or either of the defendants, nor does the fact that the Board at one time considered the advisability of making over this land to the railway company for the purposes of a station, act as an estoppel. It may well have been a part of the extension scheme to have a station at this spot for the convenience of the public. It is not for the plaintiff to say to what use the Board should or should not put the land in carrying out their scheme.

The Board was not competent to withdraw from the acquisition, and it is not shown that, between 10th January 1913, and the rescinding of the resolution of that date, the plaintiff materially altered his position. In fact, he was warned not to do so. On the question of estoppel we, therefore, cannot agree with the Court below. The next question is as to the effect of the errors of procedure which took place in the course of the acquisition. We have detailed those errors above and they need not be repeated. With the necessity for the acquisition the plaintiff has no concern. The delay in the acquisition does not invalidate the proceedings. The survey was made at the very beginning of the proceedings. The chief complaint, and in fact the only one of any substance is that the two khatas are divisions only on paper and that the acquisition was carried out in two parts, and that in respect to khata No. 22 no notice was issued to the plaintiff under S. 9, and no public notice apparently at all, and that in case of neither of the two khatas was the full fifteen day's notice given to anybody. In the case of khata No. 23, the plaintiff received ten days' notice. The question is whether these errors so vitiate the proceedings that the Court ought to declare them null and void.

The plaintiff himself is not free from blame: when he purchased the property he did not apply at once for mutation of names. This gave the opportunity to Imdad Husain to execute the second sale, with the result that, when the acquisition proceedings commenced, one-half of the property only stood in the plaintiff's name and the other half in the names of other persons. The Acquisition Officer dealt first with the latter half and acted on the Khewat entry. He issued notice to the recorded owners whose names were in the khewat and they had no

objection. But the plaintiff was well aware of the acquisition proceedings. Other lands of his were acquired under the notification in 1911, and he contested that matter also. It was referred to the District Court and he came up on appeal to this Court. Moreover, he had actual knowledge himself of the proceeding regarding Khata No. 22 for on 9th March 1912, the date fixed for the making of the award, he entered the Court and filed his petition to the officer asking that the compensation should be paid to him and not to anybody else, and the sum awarded was actually credited to him in the Treasury. As a person interested he, under S. 18 of the Act, could have applied for a reference to the District Court. Though he is a lawyer and had had a similar case of his own in 1911, he took no steps under S. 18. In the case of Khata No. 23 he received notice, though only ten days before the date fixed. He appeared and objected and applied under S. 18 and a reference was made to the District Court. As their Lordships of the Privy Council have said in *Ezra v. Secy. of State* (1):

"When the sections relating to this matter are read together, it will be found that the proceedings resulting in this award are administrative and not judicial, that the award in which the inquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the lands, and that, if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court."

The ultimate duty of the officer is, not to conclude the owner by his so-called award, but to fix the sum which, in his best judgment, is the value that should be offered. If the proceedings are taken in such a manner that the true owner is barred from obtaining a judicial pronouncement on the matter, then there may perchance, be good ground for complaint. But, as pointed out in *Ganga Ram v. Secy. of State* (2), the very provisions of S. 9 show that persons interested, who are not known or believed to be interested, may not have notice and yet the proceedings may go on validly. If the Collector wilfully and perversely abstains from giving notice, then his proceedings cannot be considered bona fide and should be held inoperative in vesting the land in Government, but where, through mere inadvertence or mistake, a person interested has not had

notice served upon him, the reason of the nonservice is rather allied to ignorance of the fact of his being interested than to wilful perversity. In the present case there is nothing to show that the proceedings were fraudulent or corrupt.

Now, in the case of Khata No. 22 the plaintiff was not recorded as an owner. In the Khasra, no doubt, there was a note by the Patwari of his possession, but the Acquisition Officer worked on the Khewat. There, no doubt, was a mistake. The plaintiff has alleged malice and enmity, but his allegation is not supported by any evidence and in the end he did receive actual information, though not legal notice, and he did enter the officer's Court-room and actually filed his petition on the date fixed for the award. He had every right to apply for a reference and could have done so. He preferred to abstain from seeking the judicial pronouncement to which he was entitled and to bring the present suit and to take his stand on the fact that no notice had issued to him. He was not prevented from obtaining the remedy which the law gave him. There is, therefore, no sufficient reason for holding that the vesting of the land in Government did not take place. There can be no sympathy with a litigious person who has acted as the plaintiff has done. The ruling in *Ganga Ram's case* (2) has received the approval of this Court in First Appeal No. 67 of 1915 [*Musammam Shahjahan Begum v. Secy. of State* (3)] which we have mentioned, and we fully approve of it also. If the plaintiff had been debarred from seeking and obtaining a reference to the District Court we might, perhaps, have held otherwise, for every person interested has the right given to him by S. 18, which, in certain circumstances, allows a period of six months from the date of the award. In the present case the proceedings in regard to Khata No. 23 were taken within six months of the award of 9th March 1912, of which the plaintiff had actual knowledge though legal notice had not been served upon him. He was well aware of the award and deliberately abstained from exercising his right under S. 18 of the Act.

In the case of Khata No. 23 he has still less right to complain, for notice was issued to him, though only ten days before the date fixed, and the reference

to the District Court is actually pending and all his grievances can be aired there and full compensation awarded. Nor do we think that the fact that the two Khatahs were treated separately (though there are no division marks upon the land itself) is sufficient cause for invalidating the proceedings. That is a matter of really very little concern when full compensation can be granted under a reference to the District Court. We therefore, hold, on the above findings, that the plaintiff is not entitled, in the circumstances of this case, to the declaration granted by the Court below.

We, therefore, allow the appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit with costs of both Courts, including, in this Court, fees on the higher scale.

We notice with deep disapproval that the Court below did not deliver judgment until eight months after the evidence was concluded. Delays of this description are greatly to be deprecated and may in some cases amount to a scandal and a denial of justice.

V.B./R.K.

Appeal allowed.

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LINDSAY, J.

Emperor

v.

Bindeshri Goshain and another—Accused.

Criminal Ref. No. 116 of 1919, Decided on 21st February 1919, by Sess. Judge, Gorakhpur.

Criminal P. C. (1898), S. 254—Magistrate competent to try case—Commitment is not legal.

A Magistrate ought not to commit an accused person for trial to the Court of Session, in a case which he is competent to try and in which he can impose a sentence adequate to meet the ends of justice. [P 366 C 2]

Referring Order.—Bindeshri Goshain, aged 25, acting constable, and Bindeshri Ahir, aged 20 Chaukidar, have been committed by Qazi Muhammad Mustafa, Deputy Magistrate of the first class, to this Court for trial on a charge that they released Balraj Bhat, who had been made over to their custody on a charge of house-trespass in the house of Sheobalak Kahar, and did not take him to the thana, an offence punishable under S. 222 (3), I. P. C. It is the prosecution case that Balraj Bhat committed house-breaking by night with intent to commit

theft, and this should have been set out in the charge-sheet. The prosecution case is that he was lawfully committed to the custody of Bindeshri Goshain, constable, and Bindeshri Ahir, and that they being legally bound to keep him in confinement, intentionally suffered him to escape. This offence is punishable under S. 222 (3), I. P. C. by the Court of Session or a Magistrate of the first class. In his order of commitment the learned Deputy Magistrate simply states that as the offence falls under S. 222 (3), I. P. C., the accused persons are committed for trial to the Court of Session. He does not appear to be aware that the case was triable by himself. He does not give, as a reason for committing it to the Court of Session, that he was not able to pass an adequate sentence.

Section 254, Criminal P. C., directs that in a case which he is competent to try, if a Magistrate is capable to pass a sentence which in his opinion is adequate, he shall frame a charge and proceed with the trial. As the present case was triable by the Deputy Magistrate, he should have acted under S. 254, Criminal P. C. and tried the case himself, unless he considered that he could not punish the offence adequately. In fact the case appears to be one which the Magistrate could adequately punish. It has been held in *Emperor v. Jagmohan* (1) that a commitment is bad in law where a Magistrate does not say, in a case which he is competent to try, that the sentence which he can impose will not be adequate to meet the ends of justice. In *Queen-Empress v. Kayemullah Mandal* (2) it was held that a commitment of an accused person by a Magistrate to the Court of Session on a charge under S. 147 I. P. C. was bad, unless the Magistrate stated that in his opinion he was unable to pass an adequate sentence. In my opinion the commitment of the present case is bad for the same reason that the Magistrate did not state his opinion that he could not pass an adequate sentence in a case which he was competent to try. I therefore recommend that the commitment be quashed and that the Magistrate should himself proceed with the trial of the case.

Judgment.—For the reasons stated in the order of reference of the Sessions

(1) [1909] 4 I. C. 812.

(2) [1897] 24 Cal. 429

Judge, I set aside the commitment of the two accused Bindeshri Goshain and Bindeshri Ahir and direct the Magistrate who committed them for trial, to try the case himself.

V.B./R.K. *Commitment set aside.*

A. I. R. 1919 Allahabad 367

WALSH AND STUART, JJ.

Mohammad Abdul Baqi Khan—Petitioner.

v.

Sirajulhasan and others—Opposite Parties.

Misc. Ref. No. 263 of 1919, Decided on 21st May 1919, from Commr. of Allahabad Divn.

U. P. Municipalities Act (2 of 1916), Ss. 19 to 26—One election petition against one or more is competent.

It is competent for an unsuccessful candidate at Municipal election, petitioning against the election of more than one successful candidate, to join in one petition a claim that all or any of the candidates, being more than one, be unseated. [P 369 C 1]

B. E. O'Connor, Iqbal Ahmad and Uma Shankar Bajpai—for Petitioner.

Moti Lal Nehru, Tej Bahadur Sapru, S. M. Sulaiman, Bhagwati Shankar and Mukhtar Ahmad—for Opposite Parties.

Judgment.—This is a question of procedure arising out of an election petition consequent upon a recent Municipal election in Allahabad which has been referred to us by the Commissioner, the tribunal appointed for the trial of the petition, such reference being in his opinion a question of law under S. 23, sub-S. 2, Cl. (e), Municipalities Act. The point may be shortly stated in this way: Is it competent for an unsuccessful candidate petitioning against the election of more than one successful candidate to join a claim that all or any of the successful candidates, being more than one, be unseated in one petition? In this particular case there were six candidates, three of whom were elected, the present petitioner being the 4th, two other persons who were formerly respondents and have been struck out being 5th and 6th on the poll. The petition claims that upon various grounds raising questions of legality, corrupt practices, personation and so forth, the three successful candidates should be declared not to have been duly elected or in other words, unseated and that the petitioner and his two colleagues (the two other unsuccessful candidates) should be

declared elected in their places as members of the Board or that vacancies should be declared in respect of those candidates decided to be unseated. A further claim is made that in view of the practices alleged, the Court should take proceedings under other sections of the Municipalities Act against the respondents.

The provisions with regard to election petitions and the procedure thereunder are contained in Ss. 19 to 26, Municipalities Act and, with one possible exception which has given rise to the main argument on behalf of the respondents in this case, seem to us to be clear and free from any difficulty. By S. 19 the lawful election of a candidate as a member of the Board may be questioned in an election petition on certain grounds. By S. 20 such petition must be presented within 15 days of the election day and shall contain a summary of the grounds on which the election is challenged. Further, by the same section a right is given either to an unsuccessful candidate or to ten or more electors to present the petition. In the case of the candidate presenting the petition, he must be one who claims to be declared elected in the room of the person whose election is questioned. If this provision stood alone, it would appear to indicate that the petition in the case of an unsuccessful candidate claiming to be elected in the place of the successful candidate, who is unseated, must be confined to one successful candidate. The result of this would be a somewhat clumsy arrangement, because there is nothing in the Act which indicates that if an unsuccessful candidate acting upon information in his possession believes that he has grounds for unseating all three but is uncertain of his success against either of the particular individuals, he may not, if he wishes to make assurance doubly sure, claim that each of the three be unseated and that he be elected in the place of either one or other of those whose election is declared void; he would be compelled in that case to file separate petitions against each.

Clause 23, however, gets over this difficulty. By sub-S. 2 (a) it is provided that two or more persons whose election is called in question may be made respondents to the same petition and their cases may be tried at the same time, and any two or more election petitions may be heard together but so far as is consis-

tent with such joint hearing, the petition shall be deemed to be a separate petition against each respondent. That section is perfectly clear. It provides in unmistakable language for a joint petition against more than one respondent, otherwise it would be inappropriate to deem it to be a separate petition; if only separate petitions were allowed there would be no necessity for the legislature to provide for a petition to be deemed to be separate against each respondent. After all the argument would be the same if the unsuccessful candidate filed a separate petition against each of the three successful candidates claiming the seat of each. He could not fill more than one vacancy, if all his petitions succeeded. The word "petition" is clearly used in the section in two senses. In the earlier part of the clause "petition" means the paper or complaint which is originally presented and which must be presented within 15 days and must contain the summary of charges. That is the petition which is in question in this reference, the contention being that it is bad ab initio because presented against three respondents, but in the latter part of the section the word "petition" clearly means the procedure under which the complaints against the election of a candidate are investigated and decided. The word "petition" is quite common both in familiar use and in legal use in both senses and what that clause clearly provides is that a joint petition filed against one or more respondents who have been elected may be heard as one or as two and usually for the purpose of evidence be treated as separate petitions against each individual, giving the Court a wide discretion for its own conduct of its own proceeding but protecting the respondent against any unfair breach of the laws of evidence.

This seems to us a perfectly reasonable provision on general grounds. The mere fact that so short a time as 15 days is allowed for the presentation of the petition places a very heavy burden indeed upon the petitioner to prepare any sort of case at all, in a matter covering such a wide area as a contested election, and it is far easier as a matter of procedure for the Court in the exercise of its discretion to separate cases which have once been united in a joint complaint than it is to consolidate several cases which have been

originally filed as separate and distinct matters. So far as the consequences of the proceeding are concerned it is really unimportant, except for the purpose of qualifying the candidate who presents the petition to present the petition by declaring himself ready to fill a vacancy which he asks to be created, whether as a matter of law the Court decides in its discretion to declare the unsuccessful candidate elected in the place of the candidate unseated or whether it prefers to declare that the seat is merely vacant, and that a fresh election should be held. That decision does not in the least depend upon the claim made by the candidate presenting the petition, but upon the general circumstances of the case and the exercise of the Court's discretion which is wide under the Act.

The real difficulty of construction raised by Dr. Sapru in his argument on behalf of the respondent occurs in the use of these words in Cl. 20, sub-S. 2. The candidate who presents a petition must be a person

"who claims in the petition to be declared elected in the room of the person whose election is questioned,"

and it is said that this by implication imposes a limitation not upon the procedure but upon the right, that is to say, inasmuch as one man can take only one vacant place, if it is desired to challenge the election of more than one successful candidate, it cannot be challenged by one man because he cannot ask to fill the vacancies of the persons whose election he questions. In other words, as he cannot fill the vacancy of three persons, he cannot by himself question the election of three persons. There is a good deal to be said for this argument, but on the whole we have come to the conclusion that it is not the correct view, for these reasons: It seems to us that the intention of the legislature really was, as is sufficiently expressed in this clause, that whereas any number of electors might question an election so long as they are not less than 10 in number without reference to any claim to succeed to the vacancy if one were created as the result of the petition, in the case of a candidate who no longer holds any position distinct from that of an ordinary elector after the election is over, he must show, so to speak, his bona fides, or at any rate his public spirit by following

up the attack which he makes upon his successful rival by willingness to take his place if he is unseated, and reading the other portions of the Act in connexion with Cl. 20, sub-Cl. 2, particularly S. 25 which gives a wide discretion to the Court as to whether it shall or shall not declare any other candidate to have been duly elected or prefer to declare a vacancy and therefore involve re-election, all that was meant was that so long as the candidate claimed the vacancy, he was qualified to present a petition, but there is nothing in the rest of the Act to indicate that he may not do as this petitioner has done, that is, claim one vacancy in particular and leave it to the Court to decide whether the other vacancies which he has also attacked shall be filled by the other unsuccessful candidates or left vacant.

As a general rule where a vacancy is declared for malpractices, corruption and so forth such as are alleged in this petition, it by no means follows that the unsuccessful candidate, in this case the petitioner, has any moral claim to the vacancy when it is declared; whereas if as the result of an election petition it is shown that, if the election had been conducted according to law, i. e., there had been no personation or duplicate voting or vote by unqualified voters and so forth, the unsuccessful candidate would probably have succeeded, then no doubt the unsuccessful candidate is awarded the seat.

But where the vacancy is created by a decision that the election has been carried through by improper practices, the usual consequence is that a vacancy is declared and a fresh election ordered. Having regard to these considerations, it seems to us that S. 20, sub-S. 2 does no more than require the candidate presenting the petition to claim the seat of the person or one of the persons whom he claims to have been unduly elected. This the petitioner has done. We think that it is in accordance with the Act and that the answer to the question must be that the claim (we think the words "cause of action" in connexion with an election petition should be altogether avoided) made by the petitioner is properly made and that the petition is presented according to law. We think, subject to any special reason to the contrary which the Commissioner may consider, that the

costs of this proceeding should be costs of the petition.

V.B./R.K.

Answered in the affirmative.

A. I. R. 1919 Allahabad 369

PIGGOTT, J.

Laltu—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 177 of 1919, Decided on 7th July 1919, from order of Dist. Magistrate, Cawnpore.

Criminal P. C. (5 of 1898), S. 109 (b)—Explanation disbelieved—Accused held could not be said to be unable to account for presence at particular place within provisions of Cl. (b).

Accused was arrested under suspicious circumstances and was placed before a Magistrate, within whose jurisdiction he resided, who disbelieved his explanation of his presence at the place where he was arrested and under S. 109, bound him over to be of good behaviour:

Held, that the Magistrate's action was bad in law, as it could not be said that the accused was unable to give a satisfactory account of himself within the meaning of Cl. (b), S. 109. [P 370 C 1]

S. N. Mukerji—for Applicant.

Assistant Govt. Advocate—for the Crown.

Judgment.—The point raised by this application in revision may be stated thus: One Laltu was arrested by certain Police Officers along with a number of other persons in a lane in the City of Cawnpore under what were undoubtedly suspicious circumstances. The matter came before the Joint Magistrate of Cawnpore, and he was of opinion that Laltu had not given a true explanation of his presence on the night in question at the spot where the police arrested him. Upon this finding Laltu has been bound over to be of good behaviour under S. 109, Criminal P. C. I have ascertained that Laltu resides within the jurisdiction of the Joint Magistrate before whom proceedings were taken. I do not think it is possible to apply the provisions of S. 109, Criminal P. C. to the state of facts above set forth. There are two cases of this Court more or less in point that of *Sharif Ahmad v. Emperor* (1) and that of *Ghulam Jilani v. Emperor* (2). The latter was obviously a much stronger case against the applicants in revision than is the one now before me. On the principles laid down in these two rulings I am quite

(1) [1910] 12 I. C. 304=8 A. L. J. 1097=12 Cr. L. J. 536.

(2) [1919] 51 I. C. 161=17 A. L. J. 432=20 Cr. L. J. 401.

satisfied that it cannot be said of Laltu that he could not give a satisfactory account of himself within the meaning of S. 109, Cl. (a), Criminal P. C. I set aside the order against Laltu and direct his sureties to be discharged and his security bond to be cancelled. If he is in custody for failure to furnish security he must be released.

V.B./R.K.

Order set aside.

A. I. R. 1919 Allahabad 370

LINDSAY, J.

Narain—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 16 of 1919, Decided on 21st February 1919.

Criminal P. C. (1898), S. 188—Person accused of committing offence of kidnapping in Native State arrested in British territory—British Courts have no jurisdiction without certificate—Penal Code (1860), Ss. 363 and 368.

An offence committed in a Native State cannot be inquired into and tried by a British Court without the certificate of the Political Agent as required by S. 188, Criminal P. C. [P 371 C 1]

The offence of kidnapping not being a continuing offence the fact that a person accused of committing such offence in a Native State is arrested in British territory does not give the British Courts jurisdiction without the certificate required by S. 188, Criminal P. C. [P 370 C 2]

R. Malcomson—for the Crown.

Criminal Reference.—The facts which have given rise to this case are as follows. Mt. Ram Piari, a girl of 11 years was taken away by a woman, Mt. Nangi to her house in Mauza Bhikhakeri in the Alwar State; that instead of sending back the girl to her father, as she used to do formerly, she took her to the Khelri Railway station, where she met the accused; that from thence all the three travelled to the Agra Fort station; that from that place Mt. Nangi was sent back while the accused purchased tickets for Kashi and took the girl with him; and that during the journey one Lal Singh had a talk with these persons and on finding from it that the girl was being kidnapped, reported the matter to the police, who challaned the case.

After the charge had been amended, the learned vakil for the accused raised a preliminary objection to the hearing of this case by this Court on the following grounds: 1. That the offences with which the accused is charged were committed in the Alwar State, and that consequently the commitment without a certificate

from the Political Agent of that State, as required by S. 188, Criminal P. C. is bad in law. 2. That as the offences took place outside the jurisdiction of this Court it has no jurisdiction to try them. From the facts that have been put down above it would appear that the offence of kidnapping the girl from lawful guardianship, with the intent that she would be compelled to marry against her will was complete at the time the girl was taken to the Khelri Railway station, and as the offence of kidnapping is not a continuing offence, I think a commitment under that charge without the certificate mentioned in S. 188, Criminal P. C. is bad in law. The second offence with which the accused is charged is that of concealing the girl after she had been kidnapped.

It is said that as the accused took her away from the place of her lawful guardian's residence, he did so with a view to conceal her. Without entering into the question whether this is 'concealment' as contemplated by S. 368, I. P. C., I may say that this offence too (if committed) was committed at Khelri Railway station and as such, a trial of that charge here without the above mentioned certificate may not be made. It was said that the offence of 'concealing' is a continuing offence, under which the minor was being 'conveyed' by the accused at the time of arrest, and consequently this Court has jurisdiction to try him under S. 181 (4), Criminal P. C. I do not think that this contention is good (vide the top of p. 348 Henderson's Criminal Procedure Code, Edn. 8 on this point). In any event the trial of this case by the Alwar Court, where the offence was committed and near which all the prosecution and defence witnesses reside, would be most desirable. I may put down in this connexion that Mt. Nangi, the principal offender has not been put in here either as a witness or an accused, and a trial of this case without her appearance would not be proper. I therefore submit this case to the Hon'ble High Court with the request that the commitment may either be quashed, or such order may be passed as may appear proper in the circumstances of this case.

Judgment.—After perusal of the order of reference made by the Sessions Judge, I am satisfied that this is a case in which the order of commitment should be quashed on a point of law. The absence

of the certificate of the Political Agent, as required by S. 188, Criminal P. C. is in this instance an absolute bar to the trial of this case [see *Queen-Empress v. Ram Sundar* (1)]. I quash the commitment proceedings accordingly.

V.B./R.K. *Commitment quashed.*

(1) [1896] 19 All. 109.

A. I. R. 1919 Allahabad 371

PIGGOTT AND WALSH, JJ.

Chabli—Defendant—Appellant.

v.

Parmal—Plaintiff—Respondent.

Second Appeal No. 272 of 1917, Decided on 5th May 1919, from decision of Dist. Judge, Budaun, D/ 18th December 1916.

(a) *Transfer of Property Act* (1882), S. 6—S. 6 merely enumerates certain rights which cannot be transferred and does not impose statutory prohibition.

Section 6, T. P. Act does no more than enumerate certain rights which cannot be transferred and does not impose any statutory prohibition against the formation of contracts relating to certain specified subjects as though they were contrary to public policy and forbidden.

[P 372 C 1]

(b) *Transfer of Property Act* (1882), S. 6—Arrangement or contract supported by good consideration and otherwise binding in equity, is binding, although result is to put one party in same position as if he had taken transfer from person entitled to inheritance.

Though an imperfect act of transfer or an act purporting to transfer rights mentioned in S. 6 confers no equitable interest on the transferee, an arrangement or contract, supported by good consideration and otherwise binding in equity upon the parties thereto, is not deprived of its binding effect merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance, if a transfer could be actually effected.

[P 372 C 1]

K died leaving him surviving four sons, P, H, G and N, who divided his property amongst themselves. H died leaving a widow who married F. Afterwards N died leaving widow. A dispute having arisen P and G came to an arrangement that, in consideration of P being allowed to retain the property of H he would not claim N's property on the death of N's widow. But when the latter died P brought the present suit against G's son for his share of N's property. G's son relied on the arrangement between P and G. The District Judge decreed the suit, holding that the arrangement relied upon amounted to an attempt to transfer the chance of an heir apparent succeeding to an estate and was illegal under S. 6 (a). On appeal to the High Court.

Held: that the arrangement made by the plaintiff with defendants, having been made upon a bona fide dispute, was good as a contract and binding upon the parties to it and their successors.

[P 373 C 1]

Ibni Ahmad—for Appellant.

Jogindra Nath Mukerji and *Kamla Kant Varma*—for Respondent.

Walsh, J.—I agree that this appeal must be allowed. The facts are that one Khamani, who died many years ago, left surviving him four sons Parmal, Hazari, Gokul and Pransukh, who divided his property amongst themselves. Hazari, the second son, died first leaving surviving him a widow named Mt. Mullo, who subsequently was married to the eldest son, Parmal. Afterwards Paransukh died without issue leaving a widow Mt. Indo. A question having arisen as to the legal effect of the remarriage of Mt. Mullo, the two surviving brothers came to an arrangement by which, in consideration of his being allowed to retain the property of Hazari, Parmal, the present plaintiff, agreed to make no claim against Gokul to the property of Pransukh on the death of the widow Mt. Indo. This arrangement was drawn up in a deed dated June 1897 duly executed and registered. This deed has given rise to the question of law we have to decide. Mt. Indo died in 1913. Parmal brought this suit against the defendant, the son of Gokul, for the share of Pransukh. The defendant set up the agreement of 1897.

The learned District Judge has found that there was a bona fide dispute and that the agreement, if legal, is binding. So far as this is a finding of fact, we are bound by it. As a matter of law, the existence of a bona fide dispute has always been held to be good consideration sufficient to support a contract, even though the claim which caused the dispute turns out afterwards to have had no foundation. In other words a family compromise or arrangement, as it is generally called in this country, is good as a contract and binding upon the parties to it and their successors, if it is founded upon a bona fide dispute. The learned District Judge has decreed the suit on the ground that the contract amounts to an attempt to transfer the chance of an heir apparent succeeding to an estate, and is therefore illegal under S. 6 (a), T. P. Act. On appeal to this Court our brother Rafique referred this question to two Judges, being one upon which judicial decisions in India have not always been consistent.

Apart altogether from authority, I am unable to agree with the view of the

Court below. Reading Ss. 5 and 6 together, it is clear that the latter section does no more than enumerate certain incorporeal, inchoate, or contingent rights which cannot be transferred by an act of conveyance from one person to another. The other rights enumerated in S. 6 show that this is so. The section is not one imposing a statutory prohibition against the formation of contracts relating to certain specified subjects, as though, for example, they were contrary to public policy and therefore forbidden. It merely enacts that a transfer or act of conveyance purporting to pass property is ineffectual to pass any interest in these particular rights. The result is that they cannot be assigned either at law, or to adopt the phraseology of English lawyers, at equity by an act of transfer. And it follows that an imperfect act of transfer, or an act purporting to transfer rights mentioned in the section confers no equitable interest upon the transferee such as was recognized by the English Courts of Equity. But this does not mean and in my judgment could never have been intended to mean, that an arrangement or contract, supported by good consideration, and otherwise binding in equity upon the parties thereto, will not be held binding in equity upon the parties to it merely because one of the results of it is to put one of the parties in the same position as if he had taken a transfer from the person entitled to an inheritance if a transfer could be actually effected.

Suppose for example, one of two brothers, either of whom may in certain contingencies become entitled to inherit the share of a third, being minded to leave the country and settle in another part of the world with invested funds, agrees with the other in consideration of a lakh of rupees, which is duly paid to him, not to claim the share of the third brother if eventually it should fall in to him, but to leave the other brother to establish his own right if he can. Such a contract would according to English law, be a good equitable defence or plea, and an absolute answer to any claim to such inheritance made by the one brother against the other. It seems to me that the Courts in India are bound to apply the rules of equity and good conscience to such an arrangement, unless it be against public policy or otherwise ex-

pressly forbidden, and that the fact that the formalities of the law of transfer do not allow such an arrangement to be effected by an assignment either in the nature of an act of conveyance or of an equitable assignment, is not sufficient to justify a negation of the obvious equity of the case. The transaction is not aimed at by the Transfer of Property Act, only the act of conveyance by an express transfer.

Apart however from these considerations the trend of authority in India appears to me to have been in the direction of supporting these transactions by the application of the rule of equity and good conscience to binding contracts or family arrangements, which have been wholly performed on one side. In any case, I agree with my brother Piggott that there is abundant authority in this Court to support this defence and that the learned District Judge was bound to follow those decisions. I refer particularly to the expressions used by their Lordships of the Privy Council in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (1) and to the recent decisions of this Court in *Kantee Chandra v. Alinabi* (2), *Nasir-ulhaq v. Faiyazulrahman* (3), *Mohammad Hashmat Ali v. Kaniz Fatima* (4) and *Barati Lal v. Salik Ram* (5). The case of *Olati Pulliah Chetti v. Varadarajulu Chetti* (6), where an alleged reversioner admitted the widow's absolute interest, without expressly relinquishing anything, is a case much in point. It was there held that a compromise cannot be impeached by one of the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right; that a compromise for valuable consideration cannot be repudiated unless it is shown to be illegal or void; and that an admission does not affect a transfer or fall within S. 6 (a), T. P. Act as a transfer of a mere spes successionis. As was said in an old English case, *Underwood v. Lord Courtown* (7):

"It only amounts to this. I give you so much for not seeking to disturb me."

(1) [1874] 1 I. A. 157=13 B. L. R. 312=3 Sar. 314 (P.C.).

(2) [1909] 33 All. 414=9 I. C. 935.

(3) [1909] 33 All. 457=9 I. C. 530.

(4) A. I. R. 1915 All. 486=27 I. C. 701.

(5) [1916] 38 All. 107=31 I. C. 919.

(6) [1908] 31 Mad. 474=18 M. L. J. 469.

(7) 2 Sc. & L. 68.

I entirely agree with the view taken in the Madras case, and it seems to me that whether or not the case of *Sumsuddin Goolam Husain v. Abdul Husain Kalimuddin* (8) was rightly decided, the dictum of the Chief Justice cited in the head-note, as to S. 6 (a), not perpetuating in India the distinction between what are known in England as assignments at law and assignments in equity, is in the nature of a trap, and has led to much misconception. An arrangement of the kind relied upon by the defendant in this case is set up as an equitable defence; it does not purport to be a transfer or equitable assignment. I agree therefore in the order allowing this appeal.

Piggott, J.—The learned District Judge has found that the agreement of 3rd June 1897, "if legal, is binding on the plaintiff." He quotes authority of the Bombay High Court, *Sumsuddin Goolam Husain v. Abdul Husain Kalimuddin* (8), in support of his finding that the agreement in question amounts in effect to the transfer of the chance of succession to an estate, and cannot be enforced against the plaintiff so as to prevent him from claiming property which has devolved upon him under the ordinary Hindu Law of inheritance. I have myself referred to a case in which the same view was taken, on a state of facts much stronger against the plaintiff than those now before us, by the late Chief Justice of the Patna High Court when Judicial Commissioner of Oudh, vide *Bajrang Singh v. Bhagwan Bakhsh Singh* (9). If the matter were res integra in this Court, I should have preferred to follow that decision, adopting the reasoning of Sir Edward Chamier. There is however clear authority of this Court the other way, which the lower appellate Court was bound to follow. I cannot take this case out of the operation of the principle enunciated by the learned Judges who decided the case of *Mohammad Hashmat Ali v. Kaniz Fatima* (4). It is true this decision has not been reproduced in the authorized reports; but it has been founded upon and approved in *Barati Lal v. Salik Ram* (5). So long as this Court continues to refer to unauthorized reports, it practically lays upon Courts subordinate to it the burden of doing the same. I may say that I

should myself have concurred in the decision in *Mohammad Hashmat Ali v. Kaniz Fatima* (4), on the ground that in that case all defects, of title were covered by the decree of a competent Court binding on the parties but the case was not decided on this ground. The learned Judges distinctly held that it is competent for a person to contract not to claim an inheritance, in the event of his becoming entitled to it on the death of a living person. There are older authorities of this Court pointing in the same direction to be found in Vol. 8, *A.L.J.* I think the Court below was bound to follow the authority of this Court, and I therefore concur in setting aside the decree of the lower appellate Court and restoring that of the Court of first instance. The appellant must get his costs throughout, including in this Court fees on the higher scale.

By the Court.—The order of the Court is that the decree of the lower appellate Court be set aside, and the decree of the first Court restored. The appellant must pay all the costs, including costs in this Court on the higher scale.

V.B./R.K.

Decree set aside.

A. I. R. 1919 Allahabad 373

RYVES, J.

Mata Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 524 of 1919, Decided on 17th September 1919, against order of Dist. Magistrate, Agra, D/- 19th July 1919.

(a) Criminal P. C. (1898), S. 437—S. 437 makes notice to accused obligatory.

Before a District Magistrate takes action under S. 437, Criminal P. C. he must give notice to the accused.

(b) Penal Code (1860), S. 420—Misrepresentation must be intentional and with knowledge of truth.

Accused pawned six rings which he said were of gold. Subsequently it was discovered that the rings were of silver gilt. Accused was charged with an offence under S. 420.

Held, that the burden of proving that the accused knew that the rings were not what he suggested them to be was on the prosecution.

[P 374 C 2]

J. M. Banerji—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—In this case Mata Prasad was tried by a Magistrate on a charge under S. 420, I. P. C. and acquitted. He had pawned six rings which he said were of gold. It appeared subsequently that

(8) [1907] 31 Bom. 165=8 Bom. L. R. 781.

(9) [1908] 11 O. C. 301.

they were not made of gold but were made of silver gilt. The question was whether he knew that the rings were not what he suggested them to be. The Magistrate after examining the evidence for the prosecution came to the conclusion that he did not, or at any rate, gave him the benefit of the doubt. The reasons which he gave for coming to that conclusion seem to me sound. The District Magistrate however has ordered a re trial; presumably he means a further inquiry. It does not appear from the record that he issued any notice to the accused before doing so. It has been ruled in this Court consistently from the Full Bench case reported in *Queen-Empress v. Chotu* (1) down to the case of *Dost Muhammad Khan v. Emperor* (2) that before a Magistrate takes action under S. 437, Criminal P. C. he should give notice to the accused. I must say in my opinion I think it is scarcely necessary to have a re-trial in this case, but if the Magistrate is still of that opinion, then he will give notice to Mata Prasad and give him an opportunity of showing cause as to why an order should not be passed to his prejudice. I may point out that the onus of proving the offence in this case, the guilty knowledge, lies on the prosecution. I allow the application and set aside the order of the learned Magistrate and direct that the record be returned.

V.B./R.K. *Application allowed.*

(1) [1886] 9 All. 52(F. B.).

(2) [1917] 15 A. L. J. 627.

A. I. R. 1919 Allahabad 374

WALSH, J.

Banwari Lal and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 59 of 1919, Decided on 27th February 1919, against order of Magistrate, First Class, Moradabad, D/- 19th December 1918.

Public Gambling Act (1867), Ss. 3, 4 and 16—Persons gambling in tent—Conviction of one under S. 4, and other under S. 3—Convictions are irregular—Distribution of fine among witnesses and police officers is without jurisdiction.

A number of persons were charged with gambling in a tent on the banks of the Ganges where they had gone temporarily for bathing. The Magistrate convicted seven of them under S. 3, and one under S. 4, Public Gambling Act. He further ordered the fine to be distributed among the prosecution witnesses and a number of the police force including the Prosecuting Inspector

Held: (1) that the convictions under Ss. 3 and 4, were irregular; (2) that the Magistrate had no jurisdiction to distribute the fine among the witnesses and the police; (3) that having regard to the manner in which the trial had been conducted and the irregularities committed by the Magistrate, the convictions ought to be set aside. [P 374 C 2]

Nehal Chand—for Applicant.

Asstt. Govt. Advocate—for the Crown.

Judgment.—This is a decision by a First Class Magistrate of Moradabad. It is brought up before me directly in revision. Under the circumstances I quash the order, being dissatisfied with the way in which the Magistrate has treated the case. The charge arises out of some undoubted gambling, which was going on in a tent amongst people who were temporarily visiting Tigri for purposes of bathing in the Ganges. They were residents of Moradabad some 40 miles away and it is not suggested that this is a permanent place of gaming or that the practice had been going on for a long time. Of course persons who use temporary places may be guilty just as much as persons who use permanent places. But the fact which I have mentioned influences my mind in deciding what I ought to do in consequence of the next point to which I wish to refer. The Magistrate by a piece of great carelessness has charged and convicted seven of these persons under the wrong section, that is to say, under S. 3, for keeping the gaming house and one only under S. 4, for being found there. The mistake is a purely technical one and if I were satisfied with the evidence and with the way in which the merits of the case had been treated, I should exercise my powers as an appellate Court by altering the conviction to a proper form. In addition to this, the Magistrate has gone out of his way to refer, as I am sorry to say Magistrates too frequently do, to something within his own knowledge outside the case.

The next point is that the Magistrate has, so far as I can see, without the slightest jurisdiction, divided the total of Rs. 150 fines, which he had inflicted, between some of the witnesses in the case and a number of the police force, apparently belonging to the District including the Prosecuting Inspector. Whether one of these fortunate persons is also the informer does not appear, because the name of the informer was not given at

the hearing. The Magistrate had power to award a portion of the fine to the informer, but it does not appear that he has done so in this case to the informer as such. The Assistant Government Advocate tells me that he has not met any other instance of this procedure. It is impossible to pass it over in silence. It is a practice which, whether justified in law or not, is very much to be deprecated and I think it my duty to send the judgment to the District Magistrate to take such steps as he thinks appropriate in the circumstances. None of these points really would be sufficient in itself to justify me in interfering in revision, but taken together, they leave an uncomfortable feeling in my mind about the way in which the Magistrate has handled the case. I have therefore looked at the evidence and I find that the evidence that the alleged principal in this gambling was taking nal is remarkably thin. It requires a certain amount of credulity to believe that two or three days before the occasion in question, a police constable passing by accident heard the alleged principal demanding nal in express terms in a loud voice. The mere fact that I should not myself be convinced by the evidence, is not sufficient of course for interference in revision, but the judgment being an unsatisfactory one, the conduct of the Magistrate, in the respect which I have mentioned, being also unsatisfactory, and the evidence which he has not analyzed in detail in the judgment being somewhat thin, I quash all the convictions and order the fines, if paid, to be returned.

V.B./R.K. *Convictions quashed.*

A. I. R. 1919 Allahabad 375

LINDSAY, J.

Zafar Husain and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 850 of 1918, Decided on 21st February 1919, against order of Sess.-Judge, Agra, D/- 9th December 1918.

Criminal P. C. (1898), Ss. 106 (3) and 423 (1) (b)—Order passed by appellate Court binding accused to keep peace is not enhancement of sentence.

On a conviction under Ss. 147 and 325, Penal Code the applicants were sentenced to imprisonment on each charge and the sentences were directed to run consecutively. On appeal the Sessions Judge directed that the sentences should run concurrently and passed an order binding

over each of the accused to keep the peace for a period of three years.

Held: that having regard to the provisions of S. 106 (3), Criminal P. C., the order of Sessions Judge did not amount to enhancement of the sentence. [P 376 C 1]

*S. M. Sulaiman and Narain Prasad Asthana—*for Applicants.

*R. Malcomson—*for the Crown.

Judgment.—There are two petitions in revision before me which have been heard together as directed by the learned Judge who admitted them. One of the petitions is on behalf of Tafazzul Husain, who was convicted in the Court of a First Class Magistrate on charges under Ss. 147 and 325, I. P. C. He was sentenced on each charge to imprisonment for six months and a direction was made that the sentences should run consecutively. The other applicants Zafar Husain, Niaz Husain and Rahmat Baksh alias Thamman were tried at the same trial, they were convicted under the same sections and each of them was sentenced to rigorous imprisonment for one year on each charge, the same directions being given regarding the order in which the sentences were to be served.

The case came up in appeal before the learned Sessions Judge. He modified the order of the first Court by directing that the sentences should run concurrently and not consecutively. He also took advantage of the powers conferred upon him by S. 106, sub-S. 3, Criminal P. C., and passed an order binding each of the accused over to keep the peace for a period of three years. The accused filed two petitions here and various grounds were set out in those petitions. The learned Judge before whom they came for admission however directed that they should be admitted only on one ground, namely that the order of the Sessions Judge amounted to an enhancement of the sentence passed by the Court of first instance. In his order allowing these applications to be admitted, the learned Judge refers to two cases, namely *Queen-Empress v. Ishri* (1) and *King-Emperor v. Sagwa* (2). Those cases are not in point here. They were cases in which the appellate Court reduced the term of imprisonment and imposed a fine. Here it cannot be argued that the learned Sessions Judge had no authority to make the order binding over these accused ap-

(1) [1894] 17 All. 67.

(2) [1901] 23 All. 497.

plicants to keep the peace for, as I have said, that is a power which is expressly conferred by S. 106, sub-S. 3, Criminal P. C. It is impossible therefore to argue that this order of the Sessions Judge amounts to an enhancement of the sentence. If I were to hold so, then the result would be that the provisions of S. 106, sub-S. 3, Criminal P. C., would be rendered nugatory. There is no force therefore in the contention that the order of the Court below is illegal because it amounts to an enhancement of the sentences of the first Court. The application therefore of all the accused-applicants is dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 376 (1)

WALLACH, J.

Sheo Sahai—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 419 of 1919, Decided on 6th August 1919, from order of Dist. Magistrate, Fatehpur, D/- 17th June 1919.

Criminal P. C. (5 of 1898), S. 117 (4)—Joint inquiry is allowed in spite of chance of one accused being prejudiced by evidence against another.

Although in cases of joint inquiries there is a danger of one accused being prejudiced through the evidence against another, which does not directly affect him, being on the record, the law nevertheless allows joint inquiries under S. 117, Cl. (4). [P 376 C 2]

S. C. Mukerji—for Petitioner.

Asstt. Govt. Advocate—for the Crown.

Judgment.—This is an application by one Sheo Sahai for revision of an order of a Magistrate of the First Class binding him over under S. 110, Criminal P. C. The order was upheld in appeal by the District Magistrate of Fatehpur. The learned advocate for the petitioner complains that this client has been tried jointly with one Attal Singh; that legally no case has been made out under S. 117, Cl. 4, Criminal P. C., justifying such joint trial, as it has not been shown that Attal Singh and the petitioner have been associated together in the matter under inquiry. It is further argued that even if on a strictly technical interpretation of the section the joint trial was legal, nevertheless the applicants has been greatly prejudiced in consequence of the evidence of five witnesses who gave evidence against Attal Singh alone. It is quite true, as Mr. Satya Chandra Mu-

kerji remarks, that in cases of joint inquiries there is danger of one accused being prejudiced through the evidence against another accused, which does not directly affect him, being on the record. The law however does allow joint trial under S. 117, Cl. 4 Criminal P. C., and I am not prepared to say that the trial Court and the District Magistrate were wrong in their appreciation of the evidence before them. I therefore dismiss this application.

V.B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 376 (2)

PIGGOTT, J.

Emperor

v.

Mt. Mullia—Accused.

Criminal Revn. No. 73 of 1919, Decided on 22nd February 1919.

Penal Code (1860), Ss. 309, 312 and 511—Woman attempting to commit suicide in advanced state of pregnancy—Child born dead—Offence of attempting to commit suicide committed and not of voluntarily causing miscarriage.

Where a woman driven almost frantic by pains of prolonged labour attempted to take her own life and in so doing her infant was born dead:

Held: that she was guilty of attempting to commit suicide, but that she could not be convicted of attempting to voluntarily cause miscarriage. [P 376 C 2]

R. Malcomson—for the Crown.

Judgment.—Mt. Mulia, a woman about 30 years of age of the Kumhar or potter caste attempted to take her own life by throwing herself down a well. She has been rightly convicted of an offence under S. 309, I. P. C. It so happened that this unfortunate woman was at that moment in an advanced stage of pregnancy. Indeed the excuse she herself put forward for her rash and criminal act was that she had been driven almost frantic by the pains of prolonged labour. She was actually delivered of a child while in the well and it is not surprising that the unfortunate infant was born dead. On this state of facts the learned Sessions Judge has argued himself into a conviction that Mt. Mulia committed a further offence namely that of attempting to cause herself to miscarry and he has convicted her under S. 312, read with S. 511, I. P. C. I find it quite impossible to understand how the act in question can be brought within the purview of these sections. If any further offence was in fact committed by the

woman, beyond that of attempting to take her own life, it would apparently be one falling within the purview of S. 315, I. P. C.; but the learned Sessions Judge correctly found that the provisions of this section could not be applied. He brings it under S. 312 by reason of the definition of the word "voluntarily" in an earlier portion of the same Code. It is sufficiently obvious that so far as concerns the fact that the child was not born alive, there was no question of any attempt. The result of the woman's throwing herself into the well was that the child was born dead. I am quite satisfied that the idea of possible consequences to the child was simply not present at all to the woman's mind when she committed the rash and criminal act for which she has been rightly convicted. I set aside the conviction and the sentence under S. 312 read with S. 511, I. P. C. On her conviction under S. 309 the woman was sentenced to rigorous imprisonment for three months and this sentence she has presumably served. Orders will therefore be issued for her immediate release.

v.B./R.K. Conviction altered.

A. I. R. 1919 Allahabad 377

WALSH AND RYVES, JJ.

Jamna Pershad—Defendant—Appellant.

v.

Ram Dulare Lal and *another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 604 of 1917, Decided on 19th June 1919, against the decision of Dist. Judge., Farrukhabad, D/- 15th February 1917.

Civil P. C. (5 of 1908), S. 47 and O. 21, R. 63—Son's name removed but decree passed against father—Son ordered to bear his costs—Son preferring objection to attachment in execution—Objection allowed—Suit by decree-holder under O. 21, R. 63—Suit decreed holding that there was family conspiracy—S. 47 held did not apply to finding of fact of conspiracy.

One *J P* was impleaded as one of the defendants in a suit to recover a sum of money; his name was removed from the array of defendants and a decree was passed against his father *K P*, but the decree stated that *J P* was exempted and was to bear his own costs. In execution of the decree certain property was attached and it was objected on behalf of *J P* that the property belonged to him and not to *K P*; his objection was allowed. The decree-holder then brought the present suit for a declaration that the property was in fact the property of *K P*. The Courts found that, as the outcome of a family

conspiracy, the property had been entered in the name of *J P* and decreed the claim. In appeal to the High Court it was contended that, as *J P* was a party to the original suit, his objection was final by reason of S. 47 and it was not open to the plaintiff to bring the suit:

Held: that *J. P.*, having been expressly excluded from the former suit, was not a party to the suit, and therefore, not a party to the decree, and that, on the findings of fact as to the family conspiracy, S. 47 did not apply and the suit had been rightly decreed. [P 378 C 1]

Gulzari Lal and *Baleshwari Prasad*—for Appellant.

S. N. Sen—for Respondents.

Ryves, J.—In this appeal one technical point of some difficulty has been pressed. *Ram Dulare Lal* filed a suit in 1914 against *Kamta Prasad* and his minor son *Jamna Prasad* to recover a sum of money in the Court of the Munsif. During the pendency of the suit *Ram Dulare Lal* had petitioned that *Jamna Prasad*, the minor, should be exempted from the array of defendants. This was done. The suit was decreed against *Kamta Prasad* alone, but it was stated in the decree that *Jamna Prasad* was exempted, the actual words being *bari kiya gaya*, and he was to bear his own costs. In execution of that decree an objection was raised on behalf of *Jamna Prasad* to the effect that the property which had been attached as belonging to *Kamta Prasad* in fact belonged to him, and the execution Court upheld his objection because it appeared that the property stood recorded in the name of *Jamna Prasad*. Hence this suit for a declaration that the property was in fact the property of *Kamta Prasad*. It has been decreed in both Courts. The technical objection raised is that, inasmuch as *Jamna Prasad* was a party to the original suit, the objection raised by him being a party to the decree was final by reason of S. 47, Civil P. C., and it is not open therefore to the plaintiff to bring the suit. It seems to me personally a little difficult to hold that although *Jamna Prasad* had been expressly excluded from that suit by *Ram Dulare Lal*, he still must be held to be a party to that suit and therefore a party to the decree. However, there is authority in *Data Din v. Nanku* (1) which, though the facts are different, nevertheless points in this direction. On the other hand, there is a Full Bench ruling in *Vaddadi Sannamma v. Koduganti Radhabhaya*

(1) [1918] 47 I. C. 864.

(2) [1918] 41 Mad. 418=43 I. C. 935.

which certainly does fully support the contention of the appellant. It seems to me however that in this case the findings of fact render the application of S. 47 of the Code inapplicable. In effect this suit is to get a declaration that the property has been entered in the name of Jamna Prasad as the outcome of a family conspiracy and the finding is that this is so. Under these circumstances, it seems to us on the facts as found that the suit was rightly decreed and the appeal must fail with costs including, in this Court fees on the higher scale.

Walsh, J.—I agree.

By the Court.—We dismiss this appeal with costs including in this Court fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 378

RICHARDS, C. J. AND BANERJI, J.

Bhagwant and others—Plaintiffs—Appellants.

v.

Tursi Ram—Defendant—Respondent.

Second Appeal No. 1608 of 1916, Decided on 11th May 1918, from decree of Dist. Judge, Agra, D/- 9th September 1916.

Hindu Law—Debts—Father—Liability of son—Creditor must prove existence of debt—Mere decree against father is not sufficient.

To render a son liable for his father's debt, the creditor must prove the existence of a debt due by the father; the fact that there is a decree against the father, obtained in a suit to which the son was not a party, is not evidence against the son.

[P 387 C 2]

S. N. Sen and Narayan Prasad Athana—for Appellant.

S. K. Dar—for Respondent.

Richards, C. J., and Banerji, J.—

This appeal arises out of a suit in which the plaintiffs sought a declaration that this property was not liable to be sold in execution of a simple money decree against their father. They alleged that their father was never indebted and there was no necessity for incurring the loan. The Court of first instance held that the debt was not proved and decreed the claim. The lower appellate Court has reversed the decree, holding that the onus of showing that there was no debt lay upon the sons. Lengthy arguments have been addressed to us, in which it has been urged that having regard to the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra v.*

Bhup Singh (1) the property of the sons could not be sold in execution of a decree against the father unless the plaintiffs showed that there was legal necessity and that the doctrine of "pious obligation to pay the father's debts" could not be invoked during the lifetime of the father. We think that in any event it lay upon the decree-holder defendant to show that there was a debt due by the father and that he was wrong in saying that the onus of proving that there was no debt lay upon the sons. True it is, there was a decree against the father, but this is not evidence against the sons whom the creditor did not choose to make parties to the suit, although they appear to have been of full age. Before finally deciding the appeal we think it desirable to refer two issues to the Court below, namely: (1) Was there a debt by Bhika, the father of the plaintiffs, to the defendant Tulshi Ram? (2) Was the debt for family necessity or family purposes?

The onus in the first instance of showing that this debt was due will lie on the defendant. Ten days will be allowed for filing objections. Put up on return, after the ten days allowed for objections. On receipt of the findings the following judgment was delivered by

Banerji and Piggott, JJ.—Upon the issues referred the finding of the Court below is that there was a debt due by the father and that this debt was incurred for family necessity. Objections have been taken to the findings but they are without force. It is urged that the plaintiffs' claim ought to be decreed, at least as regards the shares of the sons. This contention is, in our opinion, untenable inasmuch as it has been found that the debt was incurred by the father for legal family necessity. Had the father alienated the family property for the payment of the debt, the alienation would undoubtedly have been valid. The Court will only do that which the father could have done; therefore the plaintiffs' claim cannot be sustained. The result is that we dismiss the appeal with costs, including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

(1) A. I. R. 1917 P.C. 61 = 39 I. C. 280 = 15 A.L.J. 437 = 19 Bom. L. R. 498 = 21 C. W.N. 698 = 1 P. L. W. 557 = 26 C. L. J. 1 = 33 M. L. J. 11 = (1917) M. W. N. 439 = 22 M. L. T. 22 = 46 L. W. 213 = 39 All. 437 = 44 I. A. 126 (P.O.).

A. I. R. 1919 Allahabad 379

PIGGOTT, J.

Kure and others—Accused—Appellants.
v.*Emperor—Opposite Party.*

Criminal Appeal No. 156 of 1918, Decided on 17th April 1918, from an order of Sess. Judge., Meerut,

(a) Penal Code (1860), Ss. 304-A and 325, 149—Accused attacking complainant with lathis—Little girl, passing by receiving blows and dying—Held accused should be convicted under S. 325, read with S. 149 and not under S. 304-A.

Accused, members of an unlawful assembly, were convicted under S. 304-A, for causing death by a rash and negligent act in the following circumstances: Armed with lathis they attacked the complainants, in the course of the affray a little girl who was near by received a couple of blows on the head from the effects of which she died shortly after. The accused were also convicted under Ss. 147 and 323, I. P. C. and for the two offences were awarded separate sentences to run consecutively:

Held: that the conviction under S. 304-A could not be maintained and that the conviction should have been under S. 325, read with S. 149, I. P. C. [P 380 C 2]

(b) Penal Code (1860), Ss. 147 and 149,—Cumulative sentences under S. 147, and some other section applicable by aid of provisions of S. 149, are not proper.

As a rule it is unsound to pass cumulative sentences under S. 147, and some other section of the Penal Code, where the latter of the two sections can only be applied by the aid of the provisions of S. 149. [P 380 C 2]

*Harendra Krishna Mukarji—*for Appellant.*Lalit Mohan Banerji—*for the Crown.**Judgment.**—This is an appeal by five persons, Kure and his sons Dava, Khimma and Kalu and a caste-fellow and neighbour of theirs named Bhikan, who have been convicted on separate charges of offences punishable under Ss. 147 and 323, I. P. C. and also of an offence punishable under S. 304-A, of the same Code. It is common ground that on the night of 28th November last, being the night following the bathing festival of the Kartiki Puranmashi, there was an affray in the village of Shaudan between two parties of Chamars, in the course of which serious injuries were suffered and inflicted. The first report was made by the prosecution witness Bhaggan Chamar who brought to the Police Station his niece Musammatt Kesi, a girl about 10 years of age. Kesi was at that time suffering from serious injuries on the head and she died shortly after having been sent to the dispensary. Bhaggan himself and his brother Mukkha,

father of the girl Kesi, were subsequently found to be suffering from injuries such as might have been received in the course of a lathi fight. On the other side the appellant Kure had received injuries on the head, on the left shoulder and on the left hand and his right wrist was apparently broken; of his sons Khimma had received a contused wound on the head and another injury of an unimportant nature, while Kalu and Dava were also slightly marked. The girl Kesi had received two distinct blows on the head by which the bones of the skull had been seriously fractured.

The evidence as to what took place is contradictory and unsatisfactory in many respects, as is not unfrequently the case where there has been an affray between two factions made up of men belonging to the same caste and residents of the same village. These Chamars usually live in some outlying portion of the village, and it would seem in the present case that the other residents of the village either heard nothing of this affair until it was over or did not think it worthwhile to concern themselves about a quarrel amongst their low caste neighbours. The only alleged eye-witness of the occurrence not a Chamar is a man of the name of Balle, a Jat by caste, who has been produced for the defence. He may have seen something of the affair, but his evidence, while supporting the case for the accused in its general outlines, seems to me most unsatisfactory and unreliable. He says that the fight was between Kure and his three sons on one side and a considerably larger number of persons, including the prosecution witnesses Bhaggan, Mukka, Cheta and Bakhshi on the other. He gives a very vague account of what took place, suggesting in one part of his evidence that it was too dark for him to see much. He had to admit afterwards that it was bright moonlight, which of course, it would be on the night in question. In one part of his evidence he says that he saw Kure fall to the ground and lying injured, and afterwards contradicts himself by saying that no one fell to the ground while he was present and that Kure must have done so after he had gone away. On his own showing he took exceedingly little interest in the business. The most significant part of his evidence is that he deposes to the presence of all, three appellants Dava, Khimma and Kalu

whereas Kalu does not admit that he was in the village at all on the night in question.

The stories told by the two parties are set forth in the judgment of the Court below and no good purpose would be served by my repeating them here. I very much doubt whether the truth as to the origin of the affray has been told by either party. I see no reason to doubt that there was a fight in which five persons or more were concerned on each side, the common object on each side being to cause hurt to members of the opposite party. Putting aside as unreliable the evidence of Balle, I certainly do not find that the remaining two witnesses called for the defence, Musammatt Manbhari and Chhuttan, suffice to show that the appellants now before me were acting in the lawful exercise of their right of private defence. It follows that they have been rightly convicted at least of rioting and causing hurt. The question of the hurt caused to the girl Kesi is more difficult. The prosecution witnesses do not suggest that the accused intended to kill this child. Their case is that she happened to be sitting with her father and uncle when an attack was made upon them by the accused and that one or more of the accused must have hit her on the head in the course of the affray. I must take it that the man who struck these blows had no intention of causing this girl's death, or of causing injury likely to result in her death or any knowledge that he was likely to do so. The question is whether the provisions of S. 301, I. P. C. can be applied to the established facts so as to make the appellants, or any of them guilty of the offence of culpable homicide by reason of the injuries suffered by this child.

I must take it that she was hit by blows intended for some other person and the question is as to the intention or knowledge with which those blows were struck. I think it may fairly be inferred that persons striking out violently with lathis in the course of a fight of this sort may be presumed to intend to cause at least grievous hurt, if grievous hurt actually results from the blows inflicted by them. Referring back to the provisions of S. 321, I. P. C., and reading that section in connexion with the one which immediately follows, it is obvious that the guilt of an accused person re-

mains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be upon one person, he actually causes the intended hurt to that person or to some other. I think, therefore that the appellants must be held guilty under the provisions of S. 325, read with those of S. 149, I. P. C. of having caused grievous hurt to the girl Kesi. The provisions of S. 304-A, which have been invoked by the learned Sessions Judge, are quite inapplicable to the facts of this case. That section must be read along with Ss. 336, 337 and 338, I. P. C. All these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Where a man strikes at another with a lathi, he is committing a criminal offence independently altogether of any element of rashness which may be involved in his conduct by reason of the proximity of a child of tender years to the person at whom the blow is aimed. I set aside the conviction of all the appellants under S. 304-A, I. P. C. but in lieu thereof convict them under S. 325, read with S. 149, of the same Code.

I have felt considerable difficulty about the question of sentences. The learned Sessions Judge has passed cumulative sentences, the effect of which is to give each of the appellants a period of two years' rigorous imprisonment. From one point of view this is not excessive in a case in which death has been caused; but I am bound to say that in the unsatisfactory state of the evidence, I feel reluctant to affirm so severe a sentence upon all the appellants. On the evidence I must take it that the death of this girl Kesi was an accident, something altogether apart from the intention of any of the persons concerned in the affray. I note also that in order to affirm the conviction under S. 325, I. P. C, I have found it necessary to invoke the provisions of S. 149, of the same Code; and I do not think it sound as a general rule to pass cumulative sentences under S. 147, and some other section of the same Code, where the latter of the two sections can only be applied by the aid of the provisions of S. 149. The result is therefore that while maintaining the sentence of one year's rigorous imprisonment passed by the learned Sessions Judge in connexion with the fatal injuries caused to

the girl Kesi, I direct that the sentences passed under the two charges (that is to say, under S. 147, 323 and Ss. 325, 149, I. P. C.) do run concurrently. The appeals are allowed to this extent and other wise dismissed.

V.B./R.K.

Order modified.

A. I. R. 1919 Allahabad 381

RICHARDS, C. J. AND BANERJI, J.

Parsotam Das and another—Plaintiffs—Appellants.

v.

Jagan Nath and others—Defendants—Respondents.

First Appeal No. 248 of 1916, Decided on 9th November 1918, from a decree of First Addl. Sub. Judge, Aligarh.

(a) **Hindu Law—Partition—Separation of one member—Surviving members may continue joint.**

The filing of a suit in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation; but from this it does not follow that where without any suit one member of a family separates himself from the others and relinquishes his rights in the family estate taking either no share in the family estate or perhaps a less share or a greater share, the surviving members cannot remain united.

[P 383 C 1]

(b) **Hindu Law—Succession—Separation of one member is virtual separation of all—Law of devolution is not affected if surviving members continue joint.**

No doubt in many cases it may be necessary in order to ascertain the share of the outgoing member to fix the shares which the other coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. But this would not alter the ordinary devolution of joint undivided Hindu property where there has never been a break in the jointness between the surviving members.

[P 383 C 1]

Baldeo Ram Dave, Moti Lal Nehru and Pannalal—for Appellants.

B. E. O'Conor and Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit for partition. A pedigree will be found at p. 12 of the paper-book, from which it appears that Bhojraj had four sons, namely, Gopal Das, Chimman Lal, Phul Chand and Nathu Ram. Gopal Das was a son by the first wife of Bhojraj; the other three were the sons by a second wife, and they were all younger than Gopal Das. Chimman Lal appears to have died so far back as the year 1898 or 1899. Phul Chand died in October 1904. Nathu Ram died in January 1905, and Bhojraj himself died a few days afterwards. Gopal Das died on 9th December

1914, and thus survived his father and his half-brothers by several years. Parsotam Das (the plaintiff) is one of the two sons of Gopal Das. His brother Chiranji Lal is alive but would not or at any rate did not join in the suit. The plaintiff's allegation was that Bhojraj and his sons by both wives remained joint until the death of Bhojraj, that upon the death of Bhojraj the brothers separated, that is, ceased to be members of the same undivided Hindu family, that they divided up between them the moveable property but left undivided the immovable property including a certain business which goes under the name of Bansidhar Bhojraj.

The defendants, who are the sons and grandsons of Chimman Lal and Phul Chand, pleaded that in the lifetime of Bhojraj, Gopal Das (the son of the elder wife) separated whilst the father and the other surviving sons and grandsons remained joint, that upon the occasion of the separation a sum of Rs. 500 in cash, some ornaments and two houses were given to Gopal Das and taken by him in order to enable him to separate from the family and that Gopal Das became separate. There was some very strong evidence in support of the story told on behalf of the defendants, and it seems to us that in the main the learned Subordinate Judge has accepted the defendants' contention. The learned Subordinate Judge believes that Gopal Das separated from his father and his half-brothers. He believes that Gopal Das from thenceforward carried on a business on his own account with which his father and his half-brothers had no concern. He believes that on the other hand Bhojraj and his other sons carried on a separate business in this very house called Bansidhar Bhojraj and that Gopal Das had no concern with it. As the result, the learned Subordinate Judge dismissed the plaintiff's suit in so far as he claimed a share in the business house, but he granted him a decree for the partition of certain shops and houses. The learned Subordinate Judge did this because he thought that while Gopal Das had taken some money and established himself in a separate business he had not given up his right to the houses and shops. He thought also that it was necessary in law that a deed should be executed if rights in the houses and shops were to be transferred or relinquished.

This latter finding of the Court below is to some extent inconsistent with the earlier part of his finding.

The learned Judge, we think, for the moment failed to appreciate the difference between "partition" and "separation." No doubt members of a Hindu family can be "separate" and still hold property in ascertained shares but which is undivided. But the separation of Gopal Das from his father and half-brothers proved by the evidence meant that he ceased to be a member of a joint and undivided family consisting of himself and them, and it necessarily followed that he had no longer any right in the property that was the joint undivided property of the joint family which he had separated himself from. We think it furthermore that the finding of the learned Judge about the houses and shops was not correct. He relies upon the fact that certain leases were made by tenants in the name of Gopal Das after the death of Bhojraj. The view of the learned Judge was that if Gopal Das had no interest in them, the leases would not have been given in the name of Gopal Das. So far as Gopal Das is shown to have been concerned with the houses during the lifetime of Bhojraj and before the separation, the leases are of no weight whatever. Some of the leases are in respect of the very houses which the defendants pleaded had been given to Gopal Das when he separated. One lease was made in February 1905. Gopal Das takes the lease as managing member of a joint Hindu family what family, is not specified. At this time all his half-brothers had died and his father also. Further it was not altogether impossible that Gopal Das might have made the lettings on behalf of the descendants of his half-brothers without any fraudulent intention of laying claim to the property, and in this connexion we may repeat that although the right to share in the business and in the houses and shops arose upon the death of Bhojraj in the year 1905, and Gopal Das did not die until the year 1914, Gopal Das never thought it right to make any claim nor even in the present suit does one of his sons Chiranji Lal. Having said so much we think it right to state what our views of the facts are before proceeding to deal in the question of law which has been argued before us. We believe on the evidence that there was a separation

during the lifetime of Bhojraj between Gopal Das on the one side and Bhojraj and his other sons on the other. We believe that Gopal Das was given and was ready to take certain property on the occasion of his separation. We believe that at that time there was no necessity to ascertain shares and in fact there was no specification of shares. We believe that there never was any actual separation between Bhojraj and his other sons and that they in point of fact remained members of a joint undivided Hindu family right up to the time of the death of Bhojraj afterwards. The contention on behalf of the appellant was that even assuming this conclusion of facts to be correct, it must be held that the separation of Gopal Das, under the circumstances which we have stated, necessarily carried with it a separation between all the other members of the family and that therefore even on the assumption that at the date of the death of Bhojraj he and the descendants of his other sons were still joint. They must be considered as a joint family which had separated and re-united and that accordingly the share, which Bhojraj would have had in the business if there had been a partition at that moment between him and his grandsons, devolves as if it was his separate property and does not devolve on the surviving members of the undivided family consisting of Bhojraj and the descendants of his younger sons.

It is true no doubt that there is an exception to the devolution of property in the case of a member of an undivided family who has separated and then re-united. This matter is discussed by Mr. Mayne in his work on Hindu Law. The question which we have to decide now is whether it can be said that this exception to the ordinary rule of devolution of joint undivided property belonging to a joint and undivided Hindu family applies in a case like the present. In the absence of authority we should certainly say no, because in our opinion there never was separation between Bhojraj and his younger sons or between Bhojraj and the descendants of his younger sons and, therefore, no re-unity. Great reliance has been placed on certain remarks of their Lordships of the Privy Council in the case of *Balabux v. Rukhmabai* (1). There their Lordships dealing

(1) [1903] 30 Cal. 725=30 I. A. 130. (P. C.).

with the facts of that particular case made the following remarks:

"It appears to their Lordships that there is no presumption when one co-parcener separates from the others that the latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member to fix the shares, which the other co-parceners are or would be entitled to and in this sense the separation of one is said to be a virtual separation of all."

We think that these remarks of their Lordships do not apply to the present case. They say that in many cases it must be necessary to ascertain the share of the outgoing members, and to fix the share of the other co-parceners and in this sense the separation of one is a virtual separation of all. We need hardly say that it was absolutely unnecessary for their Lordships to hold that merely because in some cases the separation of one "might in a sense be said to be the separation of all," it would after ordinary devolution of joint undivided Hindu property notwithstanding that there had never been any break in the jointness between the surviving members at all. A decision of their Lordships of the Privy Council in *Kawal Nain v. Budh Singh* (2) has been cited to us. In it their Lordships held that the filing of a suit by a member of a joint Hindu family for partition and claiming his share operated as a separation. Again we do not think that the decision in this case helps the appellant. No doubt their Lordships have held that the filing of a suit in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where without any suit one member of a family separates himself from the others and relinquishes his rights in the family estate, taking either no share in the family estate or perhaps a less share or greater share, it means the surviving members cannot remain united. The defendants respondents have submitted to the decree of the Court below directing partition of the houses and shops. Possibly this may not make much difference to them, because the plaintiff was obliged from the very nature of this suit to bring in the houses which the defendants say had been given to him upon his separation. Possibly as the result of our decision in the present case the

parties may think that notwithstanding the decree passed by the Court below, it is more desirable that each party should retain the houses which they had before the institution of the suit.

Objections have been filed on behalf of the defendants that the Court below ought to have awarded them costs. We think that the probabilities are that the suit was really instituted for the purpose of getting a share in the business and would not have been instituted merely for partition of the houses and shops. As, however, the respondents have submitted to the decree in this respect, we think that we cannot now award the defendant their costs in the Court below, but we leave those costs to be dealt with as the Court below shall deem just and equitable. The order of the Court is that we dismiss the appeal with costs. We allow the objection of the respondents to this extent, that we direct that the costs in the Court below including the costs of the first hearing shall be in the discretion of the Court making the final decree for partition. When awarding costs the Court may take into consideration whether or not it should allow the defendants the costs of the fee of Maulvi Shafi-ul-lah, Pleader, provided that the fee was taxable according to the rules in force at the time of the decision of the case.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 383

PIGGOTT AND WALSH, JJ.

Kali Prasad Misir and others—Plaintiffs—Appellants.

v.

Harbans Misir others—Respondents.

Second Appeal No. 282 of 1917, Decided on 5th March 1919, against the decision of Addl. Judge, Gorakhpur, D/- 11th December 1916.

Limitation Act (1908), Art. 120—Defendants recorded as owner of land in 1887—Application for partition by them in 1914—Remaining cosharers contending that settlement entry was wrong and that land was joint property of all cosharers—Plaintiff referred to civil Court for determination of title—Plaintiffs held not estopped from asserting mistake in respect of proprietary title in absence of anything done by them in 1887 to induce defendants to alter their position—Proceedings for partition gave fresh cause of action to plaintiffs—Evidence Act (1872), S. 115.

In 1887 the defendants were recorded in the village settlement papers as the owners of a plot

(2) A. I. R. 1917 P. C. 39=40 I. C. 286=44 I. A. 159=39 All. 496 (P. C.).

of land. In 1914 they applied for partition but plaintiffs, the remaining cosharers, objected that the settlement entry was wrong and that the plot was the joint property of all the cosharers. The partition Court, acting under Cl. (b), S. 111, U. P. Land Revenue Act, referred the plaintiffs to a civil Court for the determination of the question of proprietary title:

Held: that, in the absence of anything done by the plaintiffs at the settlement of 1887 whereby the defendants or their predecessors-in-title were induced to alter their position to their own disadvantage, the plaintiffs were not estopped under S. 115, Evidence Act, from asserting that there was at that time a mistake made in respect of the proprietary title to the plot in dispute; (2) that quite apart from any cause of action which may have been furnished to the plaintiffs by the settlement entry of 1887, the proceedings in the partition Court gave rise to a fresh cause of action, which came into existence either on the date the application for partition was filed, or on the date the order passed in those proceedings was made, and that therefore their suit was not barred by limitation. [P 384 C 2 P 385 C 1]

Baldeo Ram Dave—for Appellants.

Moti Lal Nehru—for Respondents.

Piggott, J.—The dispute in this case is about a plot of land, shown as plot No. 655 in the village papers prepared at a revision of settlement held in the year 1887. We must take it, as found by the lower appellate Court, that in the records then prepared this plot of land was, to the knowledge of the litigants in this case, or their predecessors-in-title, recorded as the sole and separate property of the defendants. In the year 1914 these defendants presented an application for partition, in the course of which they alleged that this plot No. 655 belonged to them in severalty, was in their separate possession and should be assigned to their mahal. The present plaintiffs, who are the remaining cosharers in the village, objected to the effect that a mistake had been made in the preparation of the Settlement Records of 1887, that as a matter of fact plot No. 655 presented a portion of the inhabited site of the village and, along with the rest of the said inhabited site, was the joint property of all the cosharers, including themselves and the defendants. They alleged further that they were, and continued to be, in joint possession along with the defendants of the aforesaid plot No. 655. This was an objection involving a question of proprietary title within the meaning of S. 111, U. P. Land Revenue Act 3, 1901. Acting under Cl. 1 (b) of the aforesaid section the partition Court required the present

plaintiffs to institute within three months a suit in the civil Court for the determination of the question of proprietary title, thus involved. The present suit was brought within the prescribed period of three months. It was resisted on a variety of pleas, all of which were determined by the trial Court in favour of the plaintiffs, and the learned Munsif accordingly granted the latter a declaration of title as prayed.

In appeal the learned District Judge has dismissed the suit upon a finding that it is barred by limitation. At the beginning and at the end of his judgment he discusses two other matters, but I am not at all clear what findings he intends to record concerning them. He seems to have realized that it lay upon the plaintiffs to prove both their title as joint owners and their possession as joint owners up to the date of the institution of the suit. In the first part of his judgment he seems to be discussing the evidence on the question of possession and to comment upon the same in a sense favourable to the plaintiffs' claim. I cannot however say that there appears to me to be any clear finding on this question of possession. At the end of the judgment the lower appellate Court remarks that, inasmuch as the plaintiffs, or their predecessors-in-title, attested as correct the settlement papers prepared in the year 1887, they are now estopped under the provisions of S. 115, Evidence Act from asserting that there was at that time a mistake made in respect of the proprietary title to plot No. 655. This finding cannot be sustained; there is nothing on the record to bring the case within the operation of S. 115, Evidence Act, or to show that by reason of anything done by the plaintiffs at the Settlement of 1887 the defendants, or their predecessors-in-title, were induced to alter their position in any way to their own disadvantage. There remains, therefore the question of limitation. The case is not free from difficulty, and of the authorities quoted by the learned District Judge the case of *Akbar Khan v. Turaban* (1) is to some extent in favour of the decision arrived at. That case has been considered in a number of subsequent rulings and so far as I am personally concerned, I stand by the views

(1) [1908] 31 All. 9=(1908) A. W. N. 252=5
A. L. J. 637=4 M. L. T. 444=1 I. C. 557

expressed by me in *Rahmatullah v. Shamsuddin* (2) I am fortified in my opinion by the fact that this case has since been cited with approval in the Calcutta High Court and that it seems to be in accordance with the decision of a Bench of this Court in *Allah Jilai v. Umrao Hussain* (3).

My opinion is that the proceedings taken in the partition Court, whereby the plaintiffs found themselves, if their statements of fact are true, for the first time in danger of being actually dispossessed of their joint ownership over plot No. 655, give rise to a fresh cause of action altogether independent of any cause of action which may have been furnished to the plaintiffs by the settlement entry made in the year 1877. The new cause of action came into existence, either on the date on which the present defendants filed their application for partition, or on the date of the order passed by the partition Court under S. 111, Local Act 3, 1901, requiring the plaintiffs, under penalty of forfeiting their title and incurring dispossession, to institute a suit like the present within a limited period. I hold therefore that this suit is not barred by limitation and that the plaintiffs' claim is not liable to dismissal on any of the grounds put forward in the judgment under appeal. I would set aside the order and decree of the lower appellate Court and send the case back to that Court in order that it may be readmitted on to the file of pending appeals and disposed of on the merits. Under the circumstances I think it fair to both parties that the costs of this appeal, which include fees on the higher scale, should abide the result of the suit.

Walsh, J.—I agree with my brother's judgment.

V.S./R.K.

Order set aside.

(2) [1913] 11 A. L. J. 877=21 I. C. 609.

(3) A. I. R. 1914 All. 184=36 All. 492=12 A. L. J. 810=24 I. C. 535.

A. I. R. 1919 Allahabad 385

TUDBALL, J.

Srish Chandra Sircar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 440 of 1918, Decided on 9th August 1918, from an order of Sess. Judge, Benares.

Penal Code (1860), S. 427 — Mischief—Contractor starting building operations at 1919 A/49 & 50

owner's instructions—Negligence on part of contractor resulting in damages to neighbouring house—Owner held not criminally liable.

The accused who lived in Calcutta wishing to rebuild his house in Benares gave the contract to a contractor and building operations were started in accordance with his instructions. In digging up the foundations the contractor did not prop up the next-door neighbour's wall and failed to take the ordinary precautions which a builder ought to have taken, with the result that the neighbour's wall sank and cracked and a fair amount of damage was done:

Held: that the damage being the result of the contractor's negligence in omitting to prop up the wall and not being due to any negligence or malice on the part of the accused the latter was not criminally liable for it. [P 386 C 1]

Satya Chandra Mukerji—for Applicant.

R. Malcomson and Haribans Sahai—for the Crown.

Judgment.—The applicant has been convicted of wilful mischief under S. 427, I. P. C. The facts of the case are as follows: The applicant is the owner of a house in Benares. He himself is a resident of Calcutta but frequently comes to Benares. He wished to rebuild his house and he gave the contract to a contractor and the building was carried out beyond doubt in accordance with his instructions. The foundations were sunk to a depth of four feet.

I assume for the purposes of this judgment that this was done on the applicant's own order. The next-door neighbour's house however had a foundation only two feet deep. The contractor did not prop up the next-door neighbour's wall and failed to take the ordinary precautions which a builder ought to have taken with the result that the next-door neighbour's wall sank and cracked and a fair amount of damage has been done. The complainant Mt. Makhna came into Court alleging that the applicant had intentionally caused the foundations to be dug four feet deep; had intentionally caused the omission to prop up her wall and had done so maliciously in order to damage her, because she had refused to sell her house to the accused when he desired to purchase it. If the Courts below had found this to be true that the accused was actuated by malice, I do not think there would be any difficulty in upholding the conviction. But as a matter of actual fact the Court of first instance distinctly says in its judgment that the evidence on this point is insufficient to establish it. The lower

appellate Court has in my opinion somewhat unfairly made the following remark:

"It is true that the Magistrate held the evidence insufficient to prove this but he did not say it was untrue."

In other words, the learned Sessions Judge, though the evidence was insufficient, thought that he was justified in holding that the fact was proved. The case can only, if it is to be fairly tried, be tried on the actual finding by the Magistrate that the alleged malice is not established. In the absence of this malice it seems to me impossible to uphold the conviction of the applicant under S. 427. There is nothing to show that he directed the contractor not to prop up the complainant's wall. It may be assumed I think that he gave the contract in the ordinary way in which contracts are given; that he was justified in expecting that the contractor would carry out his duties as a builder in a proper and efficient manner. The expert evidence which was called all went to establish this, that if the wall had been properly propped up no damage would have accrued. The damage therefore was the result of the contractor's negligence in omitting to prop up the wall. It was not due to any negligence or malice on the part of the present applicant. If anybody was liable criminally for the act it was the contractor who omitted to do his duty. In digging the foundations four feet deep he must have known that he was likely to cause damage unless he took the proper precautions which are ordinarily taken to support the neighbouring wall. The applicant cannot be said to be liable for the contractor's omission to do this. On the facts of the case found it seems to me that the conviction of the applicant is not justified in law. I allow the application and set aside the conviction and the sentence. The fine, if paid, will be refunded.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 386

STUART AND WALLACH, JJ.

Emperor

v.

Dhani and another—Opposite Parties.

Criminal Revn. No. 460 of 1919, Decided on 8th August 1919.

Evidence—Confession—Evidentiary value—It need not be always corroborated for being accepted.

The law does not require that the confession of an accused person should be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not.

[P 386 C 2]

Govt. Pleader—for the Crown.

Judgment.—The learned Additional Sessions Judge has tried this case carefully and has taken into consideration every point that can be taken in favour of the accused persons. We wish to point out to him that he is in error in referring to the principle of law

'that an accused person should not be convicted merely upon a retracted confession unless there is corroboration of the confession by other evidence.'

There is no such principle of law. The proper rule is laid down in the case which he quotes, namely *Emperor v. Kehri* (1). It is for the Court to decide whether it believes a confession or not. That is all. The law does not require any corroboration. Naturally a Court is more likely to believe a confession if it is corroborated, but the learned Additional Sessions Judge should disabuse his mind of the erroneous impression that the law requires any corroboration. It does not. However the fact that the learned Additional Sessions Judge has strained points in favour of the accused persons whom he has acquitted makes his conviction of those whom he has convicted even stronger, and we are satisfied that he rightly convicted the two appellants Dhani and Diwan of complicity in this serious dacoity. But the learned Additional Sessions Judge must understand that in cases of this nature the sentences should be substantial. Here we have a dacoity in which Lachman, the owner of the house attacked who was a lame man, was stabbed and in which Lachman's aged mother was severely beaten. The sentence of three years' rigorous imprisonment for men concerned in such a dastardly outrage is obviously insufficient. We enhance the sentences passed on both Dhani and Diwan to a sentence of ten (10) years' rigorous imprisonment.

V.B./R.K.

Sentence enhanced.

(1) [1907] 29 All. 434.

A. I. R. 1919 Allahabad 387 (1)

PIGGOTT AND WALSH, JJ.

Jaddo Tiwari—Appellant.

v.

Baram Deo Singh—Respondent.

First Appeal No. 76 of 1918, Decided on 21st January 1919, from order of Dist. Judge, Ghazipur.

Guardians and Wards Act (1890), Ss. 34 and 45—Appointment of guardian subject to furnishing security—Failure to furnish security does not exonerate him from disciplinary action.

Were a person is appointed to be the guardian of the property of a minor subject to furnishing certain security and he enters into possession and management of the minor's property, the fact of his failure to furnish security would not exonerate him from disciplinary action on the part of the Court under S. 45, Cl. (1)(b). [P 387C 1.]

Uma Shanker Bajpai—for Appellant.

Judgment.—This is an appeal by a guardian against an order which has subjected him to disciplinary action on the part of the Court under the provisions of S. 45, Cl. 1 (b), Act 8 of 1890. The main point taken is that the order appointing the appellant Jaddo Tewari to be guardian of the minor Sri Kant Acharya was made subject to his furnishing certain security. He admittedly failed to furnish the security required and the contention is that by so failing he made his appointment a nullity and ceased to be liable to any action on the part of the District Judge under the provisions of the Act in question. In view of the wording of S. 34, Cl. (a), of the Act there seems no force in this contention from a technical point of view. As a matter of fact we note that the appellant did enter into possession and management of the minor's property as his guardian and can scarcely be heard to say that, by failing to comply with one of the orders of the Court, he has escaped the liability for his failure to comply with another. The other points taken in the appeal are of no force. The appellant's subsequent compliance with another order does not relieve him from liability for having failed to comply with the previous order. We dismiss this appeal. As it has been heard *ex parte*, we make no order as to costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 387 (2)**

STUART, J.

Kalidin—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 553 of 1919, decided on 3rd July 1919, from the order of Addl. Sess. Judge, Gorakhpur, D/- 10th May 1919.

Penal Code (45 of 1860), Ss. 471 and 464—Alteration not helping but ruining case of accused—Conviction under S. 471 held bad as elements of dishonesty and fraud were wanting.

The accused altered the date of a document for the purpose of having the document received in evidence, but the alteration did not in any way help him as by altering the date he ruined his case. He was, nevertheless, convicted of an offence under S. 471. In appeal to the High Court.

Held: that inasmuch as the element of "dishonesty" or "fraud" required under S. 464 was wanting, the conviction under S. 471 could not be maintained. [P 387 C 2]

G. W. Dillon—for Applicant.

Government Pleader—for the Crown.

Judgment.—The learned Additional Sessions Judge has tried this case with great care. His reasoning is for the most part excellent and his conclusions of fact are, in my opinion, absolutely made out. I am satisfied that the appellant deliberately altered the figure "1232" into the figure "1262", under the impression that if he did not make the alteration the document would not be received in evidence. But the question remains whether on the facts as found by the learned Addl. Sess. Judge an offence is made out under the law. In my opinion an offence is not made out because the element of "dishonesty" or "fraud" required under the provisions of section 464 is wanting. "Dishonesty" is defined in Ss. 23 and 24, I. P. C. Now what did the appellant do here? He made an alteration for a very silly reason. As a matter of fact he mismanaged his case from beginning to end. It was perfectly true that the zamindar's predecessors-in-interest had granted the appellant's predecessors-in-interest land on favourable terms in recognition of their service. Now this circumstance was one which the settlement officer would no doubt have taken into consideration under the proviso to S. 87, Local Act 3 of 1901, in an application for enhancement of rent. He would not be bound by the fact one way or another, but he would take it into

consideration. The applicant could in no way be helped by making this alteration. The lease had been executed in 1282 Fasli, that is to say in 1875 A. D. He could not be satisfied with the truth, but with that stupid low cunning that distinguishes so many persons of his class not only in the Basti District, he wanted to throw the document back to the year 1,857 and in consequence ruined his own case. He behaved badly and improperly, but he did not behave "dishonestly" within the meaning of the law, and as he did not behave dishonestly or fraudulently within the meaning of the law, he cannot be convicted under S. 471. The result is that I accept the appeal and set aside the conviction and sentence.

V.B./R.K. *Appeal accepted.*

A. I. R. 1919 Allahabad 388

PIGGOTT AND WALSH, JJ.

Mohamad Niazullah Khan—Defendant—Appellant.

v.

Jai Ram—Plaintiff—Respondent.

Second Appeal No. 307 of 1917, Decided on 5th March 1919, against decision of Sub-Judge, Moradabad, D/- 7th December 1916.

Criminal P. C. (1898), S. 107—Action for damages for malicious prosecution lies in respect of proceedings under S. 107—Malicious prosecution.

Proceedings under S. 107, Criminal P. C., are of a quasi Criminal nature, which may involve considerable restriction of the liberty of the person and must necessarily injure the credit and reputation of the accused, so that an action to recover damages for malicious prosecution would lie in respect of such proceedings. [P 389 C 1, 2]

M. Ishaq Khan—for Appellant.

Panna Lal—for Respondent.

Judgment.—This is an action brought for damages for malicious prosecution by reason of proceedings instituted by a certain Mahomedan gentlemen, now the defendant, against several Hindus, including the present plaintiff, for an order under S. 107, Criminal P. C. It is found as a fact that the defendant set the law in motion (of that there is abundant evidence on the record) in the Magistrate's Court, in which these proceedings were brought. It is also found that the proceedings determined in favour of the plaintiff. It is quite true that the Magistrate in whose Court the proceeding was brought made an order binding over the present plaintiff in the large sum of Rs. 2,000 in his own security and a fur-

ther surety of Rs. 1,000. That proceeding is not subject to appeal. But proceedings were brought in order to have it reviewed, which proceedings were described as a revision before the District Magistrate.

For the purpose of this case it is not necessary to discuss the appropriate procedure under S. 125 by which a District Magistrate is empowered to cancel a bond taken under S. 107. It is sufficient to say that the revision was heard and adjudicated upon without objection by the present defendant. It was heard upon the merits, and the order of the Magistrate directing the present plaintiff to furnish security was set aside. The plaintiff has therefore established, which it was necessary for him to do in such a suit as this, that the proceedings determined in his favour. Both Courts have found that there was an absence of reasonable and probable cause.

Accepting the contention of the appellant that this is a mixed finding of law and fact with which we could interfere in second appeal, it is sufficient to say that we see no reason in law for differing from the view taken by both the lower Courts and that in fact there was abundant evidence of an absence of reasonable and probable cause. There is a concurrent finding of both Courts of malice on the part of the defendant and damages have been assessed upon what is clearly a legal basis. The only question therefore left is whether the second ground of appeal is a good ground for holding that there is no cause of action. That ground raises this question: that proceedings under S. 107, Criminal P. C., to keep the peace are not criminal, and an action for malicious prosecution will not lie. That ground raises two questions which really we think at this time of day are hardly open to argument. An action for malicious prosecution is not necessarily confined to criminal proceedings. It has always been held that strictly civil proceedings cannot be made subject of such an action, because the successful party in a civil proceeding is supposed to be indemnified by the order for costs which he gets in the end. But the English authorities have always recognized, and there are instances in India where the same view has been taken, namely in cases of attachment either before or after judgment under the Civil Procedure Code,

vide *Palani Kumarasamia Pillai v. Udayar Nadan* (1) and *Vaidinadier v. Krishnasami Iyer* (2), where such proceedings are brought maliciously and without reasonable and probable cause, that the person against whom they are brought can, if they determine in his favour, sue the complainant for any damage suffered by him.

It is not necessary to decide what is the character of proceedings under S. 107. They are undoubtedly in their nature criminal. It may or may not be an offence, according as people choose to look at it, for a person to be in a condition of mind in which he is likely to disturb the public peace. But the proceeding is one prescribed by and taken under the Code of Criminal Procedure and all the proceedings, the machinery and the result of that section are, in their nature, penal. It is sufficient to say that in the case of such proceedings the Magistrate may issue a warrant for the arrest of the person against whom a complaint is made and detain him in custody until the completion of the inquiry and if the proceeding results unfavourably, the person against whom the complaint is made is liable to be bound down in large sums with or without sureties under circumstances which may undoubtedly be extremely embarrassing to him and which certainly bring him into discredit and injure his reputation and credit in the neighbourhood. It is therefore a quasi-criminal proceedings, which may involve considerable restriction of the liberty of his person and which must necessarily injure his credit and reputation.

There are certain authorities, not of this province, where the question has been considered whether the complainant is responsible, when the proceedings have got no further than a preliminary investigation by a subordinate officer, for the purpose of making a report to the Magistrate really responsible for a decision under the section. We have not to consider here whether we agree or disagree with those authorities. This proceeding resulted in an order being made, which on the revision application was eventually quashed, and we see no reason why a person like the defendant, who brings such a proceeding merely from religious animosity or ill-temper on some

spiteful or malicious motive and thereby without any legal justification does a serious injury to the person against whom the allegation is made, should not be answerable in damages in the civil Court just as any other person is answerable in damages to whom he does a legal wrong. We think there was cause of action on the facts found by the two Courts below. We dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 389

KNOX, AG. C. J. AND STUART, J.

Piare—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 438 of 1919, Decided on 2nd July 1919, against the order Sess. Judge., Aligarh, D/- 25th March 1919.

Penal Code (45 of 1860), Ss. 300 and 302—Accused must show applicability of exceptions under S. 300—Skull fractured by lathi—Act is murder unless excepted under any of the exception.

In order to take a case out of the category of murder, it is for the accused to show that his act was covered by one of the exceptions to S. 300.

If a man takes a lathi and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it was removed from the category of murder by one of the exceptions to S. 300. [P 390 C 1]

Uma Shankar Bajpai—for Appellant.

Lalit Mohan Banerji—for the Crown.

Judgment.—Notice was served on *Piare* to show cause why he should not be convicted of an offence punishable under S. 302, I. P. C. *Piare* has been defended in this Court by a learned vakil, and we have heard what is to be said in his behalf. The evidence shows that the man *Bansi* went to the house of *Piare* to collect rent due from *Piare*, but when there he was assaulted by *Piare*, who went into his house, fetched a lathi and dealt him one blow on the head. *Bansi* dropped down and two others, who were assisting *Piare*, joined in assaulting *Piare*. We are not concerned with them at present. The learned Sessions Judge appears to us to have quite misunderstood the case. The post mortem shows that the blow inflicted by *Piare* was so severe that it caused a fracture, at the base of the skull. It was for *Piare* to show that the blow which he struck under these circumstances was not an act of wilful murder. He has not brought it under any excep-

(1) [1909] 32 Mad. 170=2 I. C. 345.

(2) [1913] 36 Mad. 375=19 I. C. 665

tion to S. 300. If a man takes a lathi and deliberately assaults another on the head with the result that the skull is fractured, that act is murder unless the accused can show that it was removed from the category of murder by one of the exceptions to S. 300. We alter the conviction to one under S. 302 and the sentence will be a sentence of transportation for life with effect from 25th of March 1919.

V.B./R.K.

Conviction altered.

A. I. R. 1919 Allahabad 390

PIGGOTT AND WALSH, JJ.

Babu Ram—Judgment-debtor—Appellant.

v.

Pearey Lal and others—Decree-holders—Respondents.

Execution First Appeal No. 168 of 1918, Decided on 24th February 1919, against decision of Sub-Judge, Budaun, D/- 6th June 1917.

Civil P. C. (1908), O. 21, R 95—Application under O. 21, R. 95 is step-in-aid of execution within Limitation Act (1908), Art. 182 (5).

An application by a decree-holder under O. 21, R. 95, Civil P. C. to obtain possession of the property purchased by him in execution of his decree is a step-in-aid of execution within the meaning of Cl. (5), Art. 182, Lim. Act, and saves limitation for subsequent applications to execute the decree.

[P 390 C 2]

G. L. Agarwala—for Appellant.

Lakshmi Narayan—for Respondents.

Piggott, J.—The question for determination in this appeal is one of limitation. The facts are not in dispute. The decree under execution was one of 3rd December 1912, and the application for execution out of which this appeal arises was presented on 15th March 1917. It was, therefore beyond limitation, unless the decree-holder could show that there had been in the interval, and within three years of this present application, another application made in accordance with law to the proper Court to take some step-in-aid of execution of the decree or order, within the meaning of Art. 182, Cl. (5), Sch. 1, Lim. Act (Act 9 of 1908). Now it is admitted that there had been in the interval a partial satisfaction of the decree by a sale of a portion of the property. At this sale the hypothecated property was sold and the decree-holder had purchased it with the leave of the Court on 20th January 1914. On 26th June 1914, the decree-holder, on the strength of this auction-

purchase, applied to the execution Court under O. 21, R. 95, Civil P. C., to give him possession of the property which he had purchased. According to a clear decision of a Bench of this Court in *Moti Lal v. Makund Singh* (1), this application does operate as a step-in-aid of execution of the decree and does save limitation for any subsequent application.

The contention for the judgment-debtor-appellant is that the principles underlying the above decision were discussed by a Full Bench of this Court in *Bhagwati v. Banwari Lal* (2) and that the decision of the Full Bench in that case is inconsistent with the view taken in *Moti Lal v. Makund Singh* (1). It is further pointed out that one of the learned Judges who delivered the judgment of the majority of the Full Bench stated in express terms that he was unable to agree with the view taken by the learned Judges who decided *Moti Lal v. Makund Singh* (1). It seems to us that the questions for decision in the two rulings were altogether different and that the opinion expressed by one of the learned Judges in the latter case cannot be treated as overruling the considered decision of a Bench of this Court on a question of limitation, which was certainly not before the Full Bench when they pronounced the later decision. In our opinion therefore the learned Subordinate Judge has rightly followed the considered decision of this Court on the particular question before him for determination. We dismiss this appeal with costs, including fees on the higher scale.

Walsh, J.—I agree. The question we have to decide is whether an application of this nature made under O. 21, R. 95, is a step-in-aid of execution within the meaning of Art. 182 of the present Lim. Act. I have already expressed my views several times that in these matters, which are matters of procedure, the Courts ought to maintain, if possible, a consistent view, even if Judges do not always agree with the view which has been already authoritatively expressed and that also in matters in which a decree-holder seeks to enforce his undoubted right, a liberal interpretation ought always to be adopted if it can be done without doing violence to the express language of the legislature. Apart from authority I

(1) [1897] 19 All. 477.

(2) [1909] 31 All. 82=1 I. C. 416 (F. B.).

should have no hesitation in holding that an application of this nature was a step-in-aid of execution. In plain language it is obviously one of the methods and a most important method of the realization of his decree by a decree-holder and the machinery for doing it by this method is provided in the Code under the ordinary order, which contains the whole of the provisions for realization by execution. A Full Bench in *Sujan Singh v. Hira Singh* (3) decided that the expression was intended to cover any application made according to law in furtherance of execution proceedings under a decree. The two Judges' decision in *Moti Lal v. Makund Singh* (1) seems to me directly in point and the reasoning contained in the judgment quite unanswerable. The point was not before the Full Bench which decided *Bhagwati Lal v. Banwari Dal* (2). In neither of the reports in which that authority is reported is the authority of *Moti Lal v. Makund Singh* (1) said to have been overruled. The judgment of the Full Bench which decided *Bhagwati v. Banwari Lal* (2) could not overrule the previous case on the point which was before them and that case must be treated as still the law in these provinces.

V.B./R.K. *Appeal dismissed.*

(3) [1890] 12 All. 399 (F. B.).

A. I. R. 1919 Allahabad 391

WALSH AND RYVES, JJ.

Khub Singh — Defendant—Appellant,
v.

Ramji Lal and others — Plaintiffs—Respondents.

Second Appeal No. 702 of 1917, Decided on 16th June 1919, against decree of Addl. Judge, Meerut, D/- 30th March 1917.

Hindu Law—Will — Construction—Gift to nephew living as joint member—Bequest to him of remainder describing him as adopted son—On suit by distant heirs adoption not proved—Bequest held intended for nephew whether adopted or not.

N, a separated Hindu, made a gift of the bulk of his property to K, his nephew, who had lived with him since boyhood and had been brought up and married by him, and who, subsequently to the gift, had assisted N, in his business and lived jointly with him. Before his death, N, executed a will bequeathing the remainder of his property to K. Upon N's death some distant collaterals of his brought the present suit against K, claiming all N's property. K, in reply, asserted the gift and the will in his favour and also stated that he was the adopted son of N. At the trial

the adoption was denied by the plaintiffs, and no evidence was led by K, on the issue relating thereto. The trial Court found that the gift was genuine and had been acted upon and that it was N's intention under the will to pass the remainder of his property to K, and dismissed the suit. The lower appellate Court, while upholding the gift, decreed the claim in respect of the property dealt with by the will, on the ground that K, could only derive benefit thereunder if he were the adopted son of N, but as he had abandoned the plea of adoption, he could derive no benefit under the will. On appeal to the High Court:

Held: that the plaintiffs were not entitled to a decree, the simple fact that the will described the donee as an adopted son, did not mean that, unless in law and in fact he was an adopted son, the testator intended that he was to get no benefit under the will. [P 392 C 2]

Tej Bahadur Sapru and Kailash Nath Katju—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—The property in dispute belonged to one Nihalo, who died on 29th December 1914. The plaintiffs-respondents were distant collaterals of Nihalo, who was a separated Hindu, and they claimed all the property left by Nihalo as his heirs. Their claim was resisted in the mutation proceedings by the appellant, on the ground that he was entitled to Nihalo's property. Mutation was granted in his favour, hence this suit. The plaintiffs claimed all the property left by Nihalo. The defendant asserted that on 15th December 1891 Nihalo had executed a deed of gift of the bulk of his property in his favour and had put him in proprietary possession of it, and that subsequently on 13th January 1912 he executed a registered will by which he left the remainder of his property to him. The defendant also stated that as a matter of fact he was the adopted son of Nihalo, and in proof produced a taluati-nama or deed of adoption, executed on 19th January 1913. The fact and legality of the adoption were denied. At the trial the defendants' pleader stated that he did not wish to give evidence on the issue of adoption as he was prepared to stand or fall on the remaining issues. The Court of first instance held that the deed of gift was genuine and that it had been acted upon, and that under it the defendant had acquired full proprietary title and possession of the properties comprised in it.

The plaintiffs' plea with regard to the will was that it was "farzi," that is to say, mere "waste paper." In argument before us it was pleaded that inasmuch

as throughout the will the defendant was described as Nihalo's adopted son, on failure of proof of the adoption the will must fail, because it was argued that the whole motive of making it was the fact of the defendant being believed to be the adopted son of Nihalo. The Court of first instance overruled this plea and held that it was the intention of Nihalo under this will to pass the remainder of his property to the defendant. On appeal the lower appellate Court found that the plaintiffs' suit as regards all the property except that covered by the will was rightly dismissed. With regard to the will that Court held that Nihalo made the will in the defendant's favour, only *qua* adopted son, and as the plea of adoption had been abandoned, it held, purporting to follow two decisions of the Privy Council, *Lali v. Murlidhar* (1) and *Fanindra Deb Raikat v. Rajeswar Das* (2), that it was necessary to find what was the intention of the testator in making the gift under the will. In both these cases in the Privy Council it was held that under the circumstances of those cases the fact that the donee was an adopted son was a condition precedent to his receiving the gift. In both cases it was found that if the alleged adoption was not valid, the gift must fail. The question in every such case is whether the donee's right to succeed depended on whether he had been sufficiently indicated, or whether he actually and legally was, the "adopted son," and whether the gift was made to him personally or only because he was believed to be the adopted son. In *Fanindra Deb Raikat v. Rajeswar Das* (2) their Lordships of the Privy Council admitted that

"the distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language (of the document) and surrounding circumstances."

Now in this case the facts are these: Nihalo had no children of his own. The defendant who was his nephew (or more accurately "wife's brother's son") lived with him apparently since his boyhood. Nihalo brought him up and got him married and as has been mentioned above, on 15th December 1891, made a gift in his favour of the bulk of his zamindari

property. Since that time the nephew had been helping Nihalo in his business and living jointly with him. Then we come to the will executed 21 years afterwards, in which he bequeathed to him the rest of his property. At that time Nihalo's wife was dead, and he had no near relatives. As said before, he was a separated Hindu. It is contended that he did not mean to leave this property to the defendant merely because he was his nephew and because he had lived with him for all these years and had been the recipient of his bounty, but because he had adopted him and for no other reason. It seems to us that it would be pressing the principle laid down in the Privy Council rulings very far to hold that simply because in this will the donee is described as an adopted son, it must be taken that the testator meant that unless in fact and law he was an adopted son he never meant him to get any benefit under the will. Under these circumstances we think that the Court of first instance was right. We allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs, including in this court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 392

RICHARDS, C. J. AND BANERJI, J.

Bharat Indu and others—Plaintiffs—Appellants.

v.

Mahomed Mustafa Khan—Defendant—Respondent.

Second Appeal No. 102 of 1917, Decided on 4th January 1919, from decree of Offg. Dist. Judge, Farrukhabad, D/- 6th September 1916.

Cosharer—Lambardar—Profits—Lambardar recovering rents is liable to account to cosharers though not appointed when rents became due.

If a lambardar after his appointment collects the rents in respect of a particular crop, he is liable in respect of them to his cosharers notwithstanding that he had not been appointed lambardar when the rents actually fell due if he actually realizes the rents, he is liable for the amount so realised. If he only recovers decrees, he is liable for the amount realized under the decrees or for the ascertained value of the decrees.

[P 593 C 1]

Surendra Nath Sen—for Appellants.

S. M. Sulaiman—for Respondent.

Judgment.—This appeal is connected with Second Appeals Nos. 103 and 104

(1) [1906] 28 All. 488=33 I. A. 97 (P. C.).

(2) [1885] 11 Cal. 463=12 I. A. 72=4 Sar. 610 (P. C.).

of 1917. They arise out of suits for profits brought against the lambardar. It appears that the plaintiffs purchased a certain share on 22nd January 1912, and that under their purchase they were entitled to arrears of profits. The defendant was appointed lambardar on 5th February 1913. The plaintiffs claim profits for kharif of 1320 and Rabi and kharif in subsequent years. The Court of first instance granted the plaintiff a decree except in respect of kharif of 1320. The plaintiff appealed and contended that the expenses allowed by the first Court were too great and that the percentage on the gross rental allowed to him was too little. He also contended that he ought to have got a decree in respect of the kharif of 1320. The lower appellate Court upheld the decision of the Court of first instance on all points and dismissed the appeals. We may say at once that we agree with the Courts below, save in so far as they dismissed the plaintiff's claim in respect of the kharif of 1320. The ground upon which both the Courts dismissed the plaintiff's claim in respect of kharif of 1320 was because the defendant had not been appointed lambardar when the rents of kharif 1320 fell due. This view is, in our opinion, not correct. If the defendant after he had become lambardar collected the rents for kharif 1320, he would be liable to the plaintiffs notwithstanding that he had not been appointed lambardar when the rents actually fell due. If he had actually realized the rents, he would be liable for the amount so realized. If he had only recovered decrees, he would be liable for the amount realised under those decrees or for the ascertained value of the decrees. Before deciding the appeals we refer the following issues to the Court below:

(1) Did the defendant realize any sums, and if so, how much in respect of kharif 1320? Were these sums realized after he had been appointed lambardar? (2) Did the defendant obtain decrees after he had become lambardar in respect of kharif 1320? If so, how much has been realized on foot of these decrees or might by reasonable diligence have been realized? (3) As the result of the findings on these issues, how much, if anything, is due to the plaintiffs in respect of their shares of the kharif of 1320? The parties may adduce evidence relevant to these issues.

On receipt of the findings the usual ten days will be allowed for filing objections.
V.B./R.K. *Issues remitted.*

A. I. R. 1919 Allahabad 393

WALLACH, J.

Badlu—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 305 of 1919, Decided on 28th July 1919, from order of Dist. Magistrate, Fatehpur, D/- 5th June 1919.

Criminal P. C. (5 of 1898), S. 110—Accused previously convicted but acquitted in appeal—Acquittal cannot be questioned.

Where an accused person is being tried by a Magistrate under S. 110, and it is found that in a previous case of dacoity he was acquitted by the Court of Session, it is not for the Magistrate to question in his judgment the decision of the Sessions Judge. [P 394 C 1]

A. P. Dube—for Applicant.

Asstt. Govt. Advocate—for the Crown.

Judgment.—*Badlu* applies in revision seeking to have an order passed against him under S. 110, Criminal P. C., set aside. This order was passed by a Magistrate of the First Class on 13th May 1919 and was upheld in appeal by the District Magistrate of Fatehpur on 5th June 1919. Ordinarily, I would not interfere in revision with findings of fact, but this case presents some peculiar features. It is argued on behalf of the petitioner that he has been greatly prejudiced by the Court of first instance having been influenced adversely to the petitioner by a judgment of the Additional Sessions Judge of Cawnpore acquitting him (the petitioner) in a dacoity case on 29th September 1918. That the petitioner's view in this respect is correct would appear from the following paragraph from the first Court's judgment:

"It would be better to say something regarding the dacoity which occurred at Chak Jahanpur, Police Circle Budki, on 31st May 1918. The dacoits carried away property to the value of Rs. 750; a part of the property was recovered from the possession of three of the accused and one of them, Bansi Singh, was made King's witness. The case resulted in an acquittal on 29th September 1918 from the Court of the Additional Sessions Judge of Cawnpore, Khan Bahadur Muhammad Husain Sahib. The evidence on the record appears to be free from bias and mostly consisted of disinterested persons who had no motive to fabricate a false case, but the learned Judge came to the conclusion that no dacoity actually occurred and that the case for the prosecution was the result of a conspiracy. An appeal against the order of acquittal of the

learned Judge could not be preferred on behalf of the Government, as the period of three months laid down by the Government of India for appeals against acquittals had expired."

The Magistrate was not justified in importing this sentence into his judgment. It was not for him to question in his judgment the decision of the Court of Session which had come to the conclusion that the case then brought against the petitioner was false and the result of a conspiracy. His remarks that the appeal could not be brought by the Local Government within the time prescribed by law are futile. If the district authorities had moved in time and the Government had desired to file an appeal, they would have found no difficulty in carrying out their intention. I have gone through the evidence on the record, and I find that several of the witnesses against him in this case were witnesses against him in the Sessions case, in which their evidence was disregarded by the Sessions Judge. This has led me to go through the further evidence against the applicant on the record which, in my opinion, is clearly insufficient to establish the case against him, a great deal of it consisting of inadmissible evidence. The first Court said in its judgment that it cannot act on the evidence of the Sub-Inspector. The reasons he has given for not doing so are sound. In my opinion the evidence on the record does not justify the orders passed by the Courts below. For the above reasons this revision must be allowed and the orders of the Court below directing the applicant to enter into a personal bond and to give sureties must be set aside. I am informed by the learned counsel for the applicant that the applicant is in custody. He must be released forthwith.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 394

TUDBALL, J.

Emperor

v.

Misri Lal—Accused.

Criminal Ref. No. 670 of 1918, Decided on 4th October 1918, by Sess. Judge, Mainpuri.

Criminal P. C. (1898), S. 562—Accused not only convicted but sentenced—Provisions of S. 526 become inapplicable.

Where an accused person has not only been convicted but also sentenced, the provisions of S. 562 become inapplicable to the case. [P 394 C 2]

Satya Chandra Mukerji—for Opposite Party.

Judgment.—This case has been referred to this Court by the learned Sessions Judge of Mainpuri. The facts are briefly as follows:—Misri Lal, a young man, aged about 24 years, a Jain by caste and also a karinda of a zamindar by profession, cheated the complainant Balkishen, another Bania, and induced him to make over to him a gold chain and two gold rings. He then pledged the gold chain to another person. What happened to the gold rings is not known. Balkishen made a complaint. Misri Lal was put upon his trial. He put forward an absurd and childish defence. The Magistrate found him guilty. He passed the following order:

"I sentence him to six months' rigorous imprisonment and pay Rs. 150 as fine. The accused is a young man of a respectable family and there is no previous conviction against him. I do not think a jail-life will be suitable for him. Therefore, under S. 562, Criminal P. C., instead of sending the accused to jail, I order that if the accused executes a personal bond of Rs. 200, with two sureties of Rs. 500 each for keeping good behaviour for six months, he be released on probation of good conduct. In default of payment of fine the accused is to undergo three months' rigorous imprisonment. Out of the fine, on being realized, Rs. 30 to be paid to the complainant as compensation after the period of appeal."

The accused appealed to the Sessions Judge, who on the facts came to the same conclusion as the Magistrate and dismissed the appeal. He then submitted the record to this Court with a recommendation that the sentence passed by the lower Court be set aside and a legal sentence be passed. It was quite unnecessary for the Sessions Judge to refer this matter to this Court. It was within his power on appeal to maintain the conviction and so much of the sentence as was legal and to set aside the illegal portion of the Magistrate's order. As the record however is before this Court and notice has issued to Misri Lal to show cause why the illegal part of the sentence should not be set aside and a suitable order passed, I proceed to deal with the case instead of wasting further time by sending it back to the Sessions Judge. It is obvious that S. 562 cannot be applied, because the Court has not only convicted the accused but sentenced him as well. So much of the Court's order as purports to have been passed under S. 562 is, therefore, set aside.

There remains the question of sentence. The learned Sessions Judge is of opinion that the sentence inflicted on appellant was in any case very inadequate. It is true that the accused Misri Lal has been guilty of rather a mean act of dishonesty. At the same time it is evident that he is not only young but also very foolish, for he promptly pledged the ornament to another man and his foolish act came to light at a fairly early date. As far as can be seen it is his first false step that he has made and it would not be wrong in the case to temper justice with a little mercy and to give him another chance in life. The present case will probably be a warning to him. The sentence imposed by the Magistrate is rigorous imprisonment for six months plus a fine of Rs. 150. The sentence is one in which a term of imprisonment, however slight, must be imposed. I reduce the sentence of imprisonment from one of six months' imprisonment to one of imprisonment for one day and substitute therefor an additional fine of rupees one hundred (Rs. 100). I further direct that instead of Rs. 30 being paid to the complainant for compensation, this sum be increased to one of Rupees fifty (Rs. 50). I allow one week's further time from the date on which this order reaches the Court below to pay the additional fine. As the accused is present in Court, I detain him in this Court till the rising thereof and thereby it will be unnecessary for him to go to jail to suffer any further punishment.

V.B./R.K.

Sentence altered.

A. I. R. 1919 Allahabad 395

LINDSAY, J.

Jamil Ahmad—Applicant.

v.

Muhammad Ishag—Accused.

Criminal Ref. No. 6 of 1919, Decided on 8th January 1919, by the Sess.-Judge, Cawnpore.

Criminal P. C. (5 of 1898), S. 250—S. 250 does not apply to complaint under Workman's Breach of Contract Act, S. 1.

A Magistrate has no jurisdiction, when dismissing a complaint under S. 1, Workman's Breach of Contract Act, to direct the complainant to pay compensation to the accused. [P 396 C 1]

Referring order.—This is an application for revision against an order of Mr. R. M. White, Joint Magistrate, Cawnpore, ordering the applicant to pay Rs. 5 compensation at the time of dis-

missing a complaint by the applicant under S. 1, Act 13 of 1859 (Workman's Breach of Contract Act). The order of the Magistrate purports to be under S. 250, Criminal P. C. That section begins:

"If in any case instituted by complainant as defined in this Code a person is accused before a Magistrate of any offence triable by a Magistrate."

An offence is defined as an act or omission made punishable by any law for the time being in force. I am of the opinion (having regard to the list of punishments given in S. 53, I. P. C., and also on the ground of usage) that an order by a Magistrate under S. 2, Workman's Breach of Contract Act, requiring a workman to perform his service contract (or to repay the money) is not an order inflicting a punishment. The punishment only supervenes when such an order is disobeyed. This view has been taken by the Calcutta High Court: *Ram Sarup Bhakat In the matter of* (1). Reference may also be made to *Averam Das Mochi v. Abdul Rahim* (2). There are rulings of the Bombay and Madras High Courts which would suggest that those Courts also hold the same view: *Emperor v. Dhondu Krishna Kambly* (3), and *King-Emperor v. Takasi Nakayya* (4). No case of the Allahabad High Court to this effect has been cited. As the defect in the order of the Magistrate arises from what is in my opinion, a defect of jurisdiction, I feel bound to report the case to the Hon'ble High Court although on its merits I do not think that the applicant has much to complain of. The Magistrate came to the opinion that the allegation by the applicant that he had advanced the accused Rs. 28 to be repaid by Rs. 4 a month was probably false and merely a counterblast to the accused having sued him for wages. The Magistrate also found that even if this were not the case, there was no contract of service based on an advance and the case was merely one of a loan. For the reasons stated above I direct that after obtaining the explanation of the Magistrate the case be reported to the Hon'ble High Court for its orders.

Judgment.—For the reasons set out in the referring order of the learned

(1) [1900] 4 C. W. N. 253.

(2) [1900] 27 Cal. 131.

(3) [1904] 6 Bom. L. R. 255.

(4) [1901] 24 Mad. 660.

Sessions Judge I direct that the order of the Magistrate by which the accused Mohammad Ishaq was directed to pay Rs. 5 compensation to the complainant be set aside. The money if paid will be refunded.

V.B./R.K.

Order set aside.

A. I. R. 1919 Allahabad 396 (1)

RYVES, J.

Phool Singh and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 526 of 1919, Decided on 17th September 1919.

Criminal P. C. (5 of 1898), S. 437—S. 437 requires that notice to accused must be given before further inquiry is ordered.

Before directing further inquiry under S. 437, Criminal P. C., the District Magistrate ought to give notice to the persons against whom he proposes to pass orders to show cause. [P 396 C 1]

Sarkar Bahadur Johari—for Applicants.

Asstt. Govt. Advocate—for the Crown.

Judgment.—In this case a Magistrate of the First Class took proceedings under S. 110, Criminal P. C., against five persons. He ordered security to be taken from two and directed that the three others should be discharged under S. 190, I. P. C. The two against whom the order was made appealed to the District Magistrate. He set aside all the proceedings of the learned Magistrate and ordered a re-trial of the whole case, i.e., the case of the men who were discharged as well as of those who were bound over. He did this apparently without giving the three persons, who were not before him, an opportunity of showing cause against such an order. I would call the learned Magistrate's attention to the ruling of this Court in *Kharga v. Emperor* (1). It was laid down in that ruling that a Magistrate, before taking proceedings under S. 437, Criminal P. C., should give notice to the persons against whom he proposes to pass orders to show cause. I therefore set aside the order of further inquiry so far as it concerns Phool Singh, Desraj and Zaharya. If the Magistrate is of opinion that further action should be taken, he will do so after giving these persons an opportunity of showing cause. Let the record be returned.

V.B./R.K.

Order set aside.

(1) A. I. R. 1914 All. 158=22 I. C. 183=26 All. 147.

A. I. R. 1919 Allahabad 396 (2)

RICHARDS, C. J. AND RAFIQUE, J.

Mt. Kulsumunnisa—Defendant—Appellant.

v.

Khaslat Husain and others—Plaintiffs—Respondents.

Second Appeal No. 1415 of 1917, Decided on 20th February 1919, from decision of Sub-Judge, Budaun, D/- 30th August 1917.

Pre-emption—Custom—Village coming into hands of single proprietor—Custom comes to end—Re-growth has to be established.

Once a village comes into the hands of a single proprietor with no cosharers, a custom of pre-emption which might have existed in the village comes to an end. The custom may grow up again, but its re-growth would have to be established by evidence. [P 397 C 1]

Where it was proved that a village was owned by a single proprietor in 1842 and that no new custom had grown up till 1862, but there was an entry as to pre-emption in the Wajib-ul-arz of 1865:

Held: that the most reasonable inference under the circumstances was that the entry referred to an arrangement between the cosharers who had subscribed to the Wajib-ul-arz. [P 397 C 1]

Iqbal Ahmad—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The first Court found that there was no custom. The lower appellate Court reversed the decree and held that the custom prevailed. The Wajib-ul-arz of 1842 shows that there was then no custom in existence and there could be no custom then because the village was owned by a single proprietor, who was entitled to sell his property to whomsoever he pleased and his vendees would take unfettered with any right of pre-emption. No doubt a custom might gradually grow up if after the year 1842 the village became possessed by a number of cosharers. But this would be a new custom and would require to be proved by evidence. The only difficulty we have in the present case is that there has been a finding by the lower appellate Court that the custom exists. So far as this is a finding of fact it is binding upon us in second appeal. We think however that under the peculiar circumstances of this case a question of law really arises. A perusal of the judgment of the lower appellate Court shows that the learned Judge thought there might possibly have been a custom of pre-emption long prior

to the year 1842 which would spring up afresh every time that the property came into the hands of more than one co-sharer. This view, we think, is erroneous. Once the property is in the hands of a single proprietor with no other co-sharer the custom has come to an end. It may, no doubt, grow up again but its re-growth would have to be established by evidence. It is admitted in this case that there was no evidence of the growth of the custom between 1842 and the year 1862. It is quite clear that the entry in the *Wajib-ul-arz* of 1865 may either refer to an existing custom or to an arrangement between the co-sharers who subscribed to the *Wajib-ul-arz* of 1865. The proper attitude in which to approach the consideration of the case was to see which of these two alternatives was the most probable. It seems to us that where it is clearly shown that in the year 1842 the property was owned by a single proprietor, the latter alternative is the only reasonable one. We allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

V.B./R.K.

*Appeal allowed.***A. I. R. 1919 Allahabad 397**

KNOX, J.

Madho Prasad—Applicant.

v.

Moti Chand—Opposite Party.

Civil Misc. Appln. No. 261 of 1918, Decided on 29th January 1919, for transfer under S. 24, Civil P. C., from Benares to Allahabad.

Civil P. C. (1908), S. 24—Transfer of case
—Case may be sometimes transferred on ground of convenience but it is no test by which transfer should be determined.

The plaintiff is the person to choose where the suit shall be brought provided that he chooses a forum which the law allows him to choose and such an extraordinary procedure as the removal of a case against the plaintiff's will from the Court where he had lodged it should be supported by some good cause. [P 397 C 2, P 398 C 1]

The only good cause which depends upon the parties is where the parties are willing and combined for some reason to ask that the case may be transferred to some other Court than that in which the plaintiff has instituted it.

A case may sometimes be transferred on the ground of convenience of parties but this is not the test by which the transfer of a case should be determined. [P 398 C 1]

Damodar Das—for Applicants.*Radha Kant Malaviya*—for Opposite Party.

Judgment.—This is an application under S. 24, Civil P. C. for transfer of a suit which has been filed in the Court of the Subordinate Judge of Benares. The prayer is that the suit may be transferred to the Court of the Subordinate Judge of Allahabad. The suit apparently was filed in the Court of the Subordinate Judge of Benares somewhere in the year 1917 and seems to have rested there until January of this year. The application is supported by an affidavit and the main ground really taken is that the trial of the suit at Allahabad will be less expensive, more convenient to the parties and also to the petitioners, and will be concluded in less time than at Benares. The petitioners, who have been arrayed as defendants in the Court of the Subordinate Judge of Benares are, the so-called affidavit sets out, residents of Allahabad and carry on banking business at Allahabad. Some of the respondents also are residents of Allahabad and own considerable immovable property situate partly in the station of Allahabad and partly in the District of Allahabad. These respondents have not joined in this petition and from this it may be presumed that they do not concur in the allegation that the trial of the suit at Allahabad would be less expensive and more convenient to them and will be concluded in less time than at Benares. All the properties mortgaged with the exception of a small building worth, it is said some Rs. 100, are situate in the district and town of Allahabad. It is upon this point that the learned vakil for the petitioners had laid very great stress.

He has also laid stress upon the fact that the main evidence in proof of the various questions that will arise in the suit will be of persons, residents in the town and district of Allahabad. He has cited rulings by which he maintains that the convenience of the parties is or should be the test as to where the suit should be tried. S. 24, Civil P. C., does not mention the words "convenience of parties" anywhere. It is a well-known maxim of law that the plaintiff is the person to choose where his suit shall be brought provided that he chooses a forum which the law allows him to choose. The transfer of a suit is an extraordinary

matter as I have already pointed out in the case of *Sachendra Nath Mitra v. Muhammad Habibullah* (1). I therefore hold that such an extraordinary procedure as the removal of a case against the plaintiff's will from the Court where he had lodged it should be supported by some good cause. The plaintiff is opposing in Court the transfer and the question which arises for decision is whether I am to hold that the fact that a very large proportion of the property held by the defendants is situate in Allahabad and the residence of most of their witnesses is in Allahabad should be considered good cause. Hitherto the transfers of cases have so far as I can find out depended much more upon the personnel of the Judge than the personnel of the parties. For instance a Judge finds himself face to face with a case or cases instituted by his landlord and very properly considers that it would be better that some person other than himself should try that case or cases; for reasons depending upon the personnel of the Judge it can easily be conceived whether it is better for all parties if it can be done without inconvenience to any of them, that the case should be tried by the same Judge other than the Judge in whose Court the plaintiff has instituted the suit.

The only good cause that I can find at present which depends upon the parties is where the parties are willing and combined for some reason to ask that the case may be transferred to some other Court than that in which the plaintiff has instituted it. There are cases which have been cited to me which show that cases have been transferred for the convenience of the parties but it should not be the test by which a case is transferred. In the present case it so happens that the file of the Subordinate Judge of Allahabad is so congested that a request has been made by the District Judge of Allahabad that I should call in the Subordinate Judge of Mirzapur and add him for the time being to the staff at Allahabad in order to facilitate the hearing of cases in the Subordinate Judge's Court. On the other hand the Subordinate Judge of Benares is not over pressed with work at the present time. He is an officer of experience and standing and has shown himself able to try difficult and complicated cases with ability. As this appli-

cation for some reason or another is opposed and strongly opposed by the plaintiffs I do not think it is a case in which so far as has been at present shown to me I should interfere and transfer. The application is dismissed with costs. The costs to the plaintiffs in this Court will be taxed at Rs. 100 (Rupees one hundred). The stay order is discharged.

V B./R.K. *Application dismissed.*

A. I. R. 1919 Allahabad 398

RYVES, J.

Chauthi Ahir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Ref. No. 630 of 1919, Decided on 10th October 1919, by Sessions Judge, Baneres, D/- 1st September 1919.

Criminal P. C (5 of 1898), S. 250—Order must be passed simultaneously with order of discharge and not in separate proceedings.

An order under S. 250 for compensation should be passed simultaneously with the order of discharge or acquittal and not in a separate proceeding. [P 398 C 2]

Order of Reference.—This is an application for the revision of an order of the District Magistrate of Jaunpur, remanding a case to the Bench of Magistrates who had passed an order for compensation under S. 250, Criminal P. C., without having recorded any objection which the complainant might have to make. The learned District Magistrate considered the defect in procedure as merely technical but in view of the rulings referred to in this application it must be held that the defect is material and cannot be corrected by a subsequent proceeding. An order under S. 250, Criminal P. C., should be passed simultaneously with the order of discharge or acquittal and not in a separate proceeding. Moreover the applicant's complaint was found to be not merely frivolous and vexatious but absolutely false. It has been held that the provisions of S. 250, Criminal P. C., cannot be appropriately applied in such cases. The record will be submitted to the Hon'ble High Court with the recommendation that the order for compensation under S. 250, Criminal P. C., be set aside.

Judgment.—I accept the reference and set aside the order for compensation.

V.B./R.K.

Order set aside.

(1) A. I. R. 1914 All. 318=24 I. C. 707.

A. I. R. 1919 Allahabad 399

RAFIQUE, J.

Manni Singh and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 443 of 1919, Decided on 13th August 1919, from order of Dist. Magistrate, Etawah, D/- 17th June 1919.

Criminal P. C. (1898), S. 110 —Evidence of both sides balanced —No bond should be taken.

In a case under S. 110, Criminal P. C., if the evidence for the defence is as good as that for the prosecution, no bonds should be taken from the accused. [P 400 C 1]

J. M. Banerjee—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is an application in revision from an order of the District Magistrate, dated 17th June 1919, confirming an order of Thakar Pateshwari Prasad Singh, Magistrate, First Class, dated 28th May 1919, directing the applicants to furnish security in different sums under S. 110, Criminal P. C. It is urged on behalf of the applicants that the learned Magistrate committed several irregularities in the proceedings that he held against them, under S. 100, Criminal P. C., and that the evidence for the defence with regard to the character of the applicants is just as good as, if not better than, that for the prosecution. In support of the first contention the learned counsel refers this Court to the order of the Magistrate made some-time about 2nd April 1919. Under that order the applicants were brought before him under a warrant instead of summonses. The learned counsel refers to the provisions of S. 114, Criminal P. C., where it is distinctly laid down that on information received a summons "shall" issue. It is further urged that the learned Magistrate had made inquiries outside the Court and probably had formed his opinion before he commenced the proceedings against the applicants. In support of this contention the following sentences from the judgment of the Magistrate are quoted:

"With regard to Raja Sahib's part in this, I may frankly say that it was on my asking him about the character of these men that he mentioned to me but I did not quite act on it. I had my own independent inquiries made from Pataaris and Mahawa people and people of other villages."

There is some foundation for the contention of the applicants. However, in the present case I think it desirable to

consider whether the evidence justifies the order made by the learned Magistrate. The evidence on behalf of the prosecution may be divided into three heads, namely, first, evidence relating to the association of the applicants with bad characters; secondly, the connexion of the applicants with certain dacoities, thirdly, the evidence with regard to their character. Now with regard to the evidence as to the connexion of the applicants with certain dacoities, the evidence is obviously false. Some witnesses depose to the effect that they had seen some of the applicants either immediately before or after the commission of dacoities in Chandarpur and Juhika. They admitted in their evidence that they did not give this information to the police when the dacoities were under investigation. It is hardly credible that the witnesses would have withheld the information from the police during the investigation of the crimes, if they really had seen the applicants in or about the scenes of the dacoities immediately before or after their commission.

Some of the witnesses depose to having seen the applicants on one or two occasions taking food to or holding conversation with some people who have been recently convicted of dacoity. Again the same remark applies to these witnesses that they did not mention this fact to the police either during the investigation or after the investigation of any of the dacoities committed recently in the district. The majority of the witnesses depose to the general repute of the applicants. They all say that the applicants are of bad character. The word used by them is "badmash." The witnesses are a Sub-Inspector of a Thana other than that within the circle of which the applicants live, the Naib of the Raja of Jogamanpore, a Patwari and a tenant of the Raja. The number of witnesses for the prosecution is 16, two of whom only come from the village where the applicants live. The others come from other neighbouring villages. On behalf of the defence 22 witnesses have been produced, two of whom come from the village of the applicants and the others from neighbouring villages. Some of them are of good status in life as far as money goes. All of them with one voice say that the applicants are men of good character and a great many of them say that there is

enmity between the applicants and the Raja of Jogamanpore. After carefully considering the evidence for both sides in the case I am compelled to come to the conclusion that the evidence for the defence is just as good as, if not better than, that for the prosecution. There can be no doubt that the present proceedings are due to the bad blood between the Raja and the applicants. I do not for a moment say that the proceedings have been initiated by the Raja and that he has procured false evidence. It is quite possible that his servants, knowing that the Raja is displeased with the applicants, have got up the case against the applicants either to please their master or get rid of men who would naturally be on bad terms with the servants of the Raja. It has been laid down in this Court more than once that in a case under S. 110, Criminal P. C., if evidence for the defence is as good as that for the prosecution, no bonds should be taken from the accused. I therefore allow the application, set aside the order of the lower Court and direct that if any of the applicants are in jail they should be set at liberty at once, and if any or all of them have given bonds, those bonds should be discharged.

V.B./R.K. *Application allowed.*

A. I. R. 1919 Allahabad 400

PIGGOTT, J.

Sher Mohammad Khan — Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 409 of 1918, Decided on 2nd August 1918, from an order of Sess. Judge, Saharanpur.

(a) Criminal P. C. (1898), S. 195 (6)—Sanction to prosecute—Superior Court is bound to entertain even belated application for revocation of sanction.

Inasmuch as a person against whom an order is made under S. 195 has a statutory right to ask a superior Court to reconsider the order and to revoke the same if sufficient cause is shown, the superior Court is bound to entertain an application for revocation of sanction and to deal with it on its merits, even if that application is belated. [P 400 C 2]

(b) Criminal P. C. (1898), S. 195—Whether limitation for appeals applies (*Quære*).

Quære—Whether the period of limitation for criminal appeals is applicable to a proceeding under S. 195 (6). [P 400 C 2]

Satya Chandra Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment. — The learned Sessions Judge of Saharanpur had in this case an application before him under S. 195, Cl. 6, Criminal P. C., against an order represented to him as being an order of sanction under the same section passed by a Magistrate of the First Class subordinate to him. The person against whom that order had been passed had a statutory right to ask the Sessions Judge, as the superior Court, to reconsider the Magistrate's order of sanction and to revoke the same if it found that sufficient cause was shown. I think the learned Sessions Judge has been to some extent misled by the fact that one or more of the pleas taken before him were pleas against the regularity or validity of the order of sanction as passed. Even with regard to these pleas, it strikes me that the learned Sessions Judge took up too rigid and technical an attitude. If, as a matter of fact, the Magistrate's order of sanction was bad in law, the sooner that point was adjudicated upon and settled by a competent Court, the better for every one concerned, and the Sessions Judge could have passed a formal order of revocation on the mere ground that the order, as it stood, was irregular and likely to prove inoperative. However this may be, there were other pleas taken in the petition in the Sessions Court which raised the question of the propriety of the order, apart altogether from its validity. This was a question which the person interested had a right to bring to the notice of the Sessions Court. The only reason given by the learned Sessions Judge for not looking into the matter from this point of view is that the application was in his opinion belated. It was made to him within 21 days of the order complained of and he does not suggest that it was barred by limitation. Even supposing that the period of limitation prescribed for a criminal appeal be held applicable to a proceeding under S. 195, Cl. 6, Criminal P. C., I think the learned Sessions Judge was bound to entertain this application and to deal with it on its merits. I set aside the order complained of and return the record to the learned Sessions Judge, with directions to restore it to its file of pending applications and to dispose of it according to law.

V.B./R.K.

Application allowed.

A. I. R. 1919 Allahabad 401

RAFIQUE AND WALSH, JJ.

Mewa Ram Singh—Plaintiff—Appellant.

v.

Ganga Ram and others—Defendants—Respondents.

Second Appeals Nos. 548, 734 and 834 of 1917. Decided on 8th July 1919, against decision of Dist. Judge, Badaun, D/- 3rd February 1917.

Transfer of Property Act (4 of 1882), S. 60—Mortgage split up by mortgagee buying portion—Heirs are entitled to redeem their share.

When a mortgage is split up by the mortgagee buying up the equity of redemption from some of the heirs of the original mortgagor, any one of the heirs of the mortgagor is entitled to redeem his share of the mortgaged property on the payment of a proportionate sum due on his share.

[P 401 C 2]

S. Agha Haidar—for Appellant.

S. N. Sen—for Respondents.

Judgment.—The three appeals, Nos. 548, 734 and 834 are connected and arise out of one and the same suit brought by *Mewa Ram* for redemption of certain property. The claim was resisted on the grounds, among others, that the suit was premature and that the mortgage sought to be redeemed was barred by limitation. The learned Munsif decreed the claim for redemption on the payment of Rs. 325, one-fourth of the mortgage money. Both parties appealed to the Court of the District Judge. The learned Judge varied the decree of the first Court by decreeing the claim of the plaintiff for some property in excess of that which was sought to be redeemed and upon payment of the full amount of the mortgage money. There are three appeals before us, as already stated, from the two decrees of the lower appellate Court. No. 548 is the appeal of the plaintiff and the other two appeals are by *Ganga Ram*, the chief contesting defendant in the case. We shall dispose of the three appeals together. *Mewa Ram*, the plaintiff, contends that the lower appellate Court should not have increased the sum for redemption or the property sought to be redeemed. He sued for the redemption of 2 biswas 10 biswansis out of the mortgaged property, but when the case went to trial before the first Court it was found that he was entitled to redemption of 1 biswa 5 biswansis only, that is, one-fourth of the mortgaged property. If the learned Judge of the appellate Court was of opinion

that he, *Mewa Ram*, was entitled to redeem more than 1 biswa 5 biswansis, redemption should have been allowed on the payment of the proportionate sum payable on the property allowed to be redeemed. The learned Judge of the lower appellate Court seems to have allowed redemption to *Mewa Ram* of 8 1/3 biswansis in addition to 1 biswa 5 biswansis. The decree for redemption however was granted on payment of Rs. 1,300 the full amount of the mortgage money. The learned counsel for *Mewa Ram* is unable to explain how his client is entitled to redemption of any property in excess of 1 biswa 5 biswansis. The learned counsel for *Ganga Ram* objects and we think rightly to that portion of the decree of the learned Judge of the lower appellate Court which allows *Mewa Ram* to redeem 8 1/3 biswansis in addition to 1 biswa 5 biswansis. The contention for *Mewa Ram* with regard to the amount payable by him is, in our opinion correct. *Ganga Ram* himself has been buying from time to time the equity of redemption from the other heirs of the original mortgagor. The mortgage seems to have been split up. *Mewa Ram* is therefore entitled to redeem on the payment of the proportionate sum due on his share. His share is one-fourth and therefore he is entitled to redemption of 1 biswa 5 biswansis on the payment of Rs. 325.

In the other two appeals the principal points urged are that the suit of *Mewa Ram* is premature inasmuch as one of the conditions of the deed of mortgage is that redemption will only be allowed in the month of Jeth; that no tender was made by *Mewa Ram* in the month of Jeth and hence the suit is premature and ought to fail. The second contention on behalf of *Ganga Ram* is that the claim of *Mewa Ram* for redemption of the mortgage of 1850 is obviously barred by limitation, unless he can show that there was an acknowledgment before the expiry of the limitation period by the mortgagees or their legal representatives; that *Mewa Ram* has not proved the acknowledgment of at least some of the legal representatives of one of the mortgagees. Hence the claim is barred by limitation. In support of the first contention the case of *Gokul Singh v. Saheb Singh* (1)

(1) [1917] 38 I. C. 162.

is cited. We think that the facts of that case are quite different from those of this. In the present case the plaintiff came into Court on the allegation that the mortgage had been satisfied by the usufruct of the property long before the suit. As to the plea of limitation, we think that the *wajibularz* was attested by Shib Lal, one of the original mortgagees, and by the two major sons of Khem Karan. Under these circumstances we think that the claim is not barred by limitation. The suit is that the appeals of Ganga Ram fail with the exception of the objection as to the redemption of $8\frac{1}{3}$ biswansis in excess of 1 biswa 5 biswansis; and the appeal of Mewa Ram succeeds with regard to the amount of redemption money. We accordingly modify the decree of the lower appellate Court by decreeing the claim of Mewa Ram for redemption of 1 biswa 5 biswansis on the payment of Rs. 325. The appeal of Mewa Ram is therefore allowed with costs. The appeals of Ganga Ram fail with the exception of the modification above mentioned. With regard to the costs of the appeals of Ganga Ram, that is Appeals Nos. 734 and 834, we direct that the parties should receive and pay costs in proportion to success and failure. We understand that in pursuance of the decree of the lower appellate Court the appellant has already paid into Court a sum in excess of that now awarded by this Court. Such excess must therefore be repaid to him and he will be entitled to redemption forthwith.

V.B./R.K.

*Decree modified.***A. I. R. 1919 Allahabad 402 (1)**

RYVES, J.

Dharam Deo Pandey—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 540 of 1919, Decided on 11th October 1919, against order of Dist. Magistrate, Ghazipur, D/-6th August 1919.

Criminal P. C. (5 of 1898), S. 437—Before ordering further inquiry notice must be given to accused.

Before further inquiry can be ordered under S. 437, Criminal P. C., notice must be given to the person who has been discharged. [P 402 C 2]

*J. N. Misra—for Applicant.**Asst. Govt. Advocate—for the Crown.*

Judgment.—This case must go back, because under the rulings of this Court,

I invite the learned District Magistrate's attention to one of them, *Kharga v. Emperor* (1) it is necessary to give notice to the person who has been discharged under S. 437 before further inquiry can be ordered. If therefore the District Magistrate is still of opinion that further inquiry under S. 109 is necessary, (*sic*) it seems to me on a perusal of the judgment of the Magistrate himself that he has probably arrived at the right conclusion. But this however is a matter entirely discretionary with the District Magistrate.

V.B./R.K.

Order accordingly.

(1) A. I. R. 1914 All. 158=22 I. C. 183=36 All. 147.

A. I. R. 1919 Allahabad 402 (2)

BANERJI AND PIGGOTT, JJ.

Niranjan Singh—Defendant—Appellant.

v.

Kundan Singh and others—Plaintiffs—Respondents.

First Appeal No. 5 of 1919, Decided on 29th July 1919, from the order of the Dist. Judge, Jhansi, D/- 20-11-1918

Civil P. C. (5 of 1908), S. 20 (c)—Accounts—Suit for, must be instituted in Court where business was carried on unless otherwise stipulated.

In the absence of proof of an agreement that accounts should be taken elsewhere a suit for the taking of accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on.

[P 403 C 1]

*K. N. Katju—for Appellant.**T. N. Chadha—for Respondents.*

Judgment.—The only question in this appeal is whether the Subordinate Judge's Court at Jhansi had jurisdiction to entertain the suit. The parties entered into a partnership to carry on business at a place called Jwalagunj in the District of Jalaun, which is within the jurisdiction of the Court of the Subordinate Judge at Jhansi. The partnership came to an end before the institution of the suit. The claim was that an account of the partnership be taken and the balance which might be found due may be awarded to the plaintiffs. Defendant 1, who is the principal defendant in the suit, contended that there was a contract between the parties that the final accounts should be rendered at Cawnpore and payments should be made there and that the Jhansi Court had therefore no jurisdiction to entertain the suit. The Court of first in-

stance found in his favour and dismissed the suit. The learned Judge set aside the order of dismissal on appeal and remanded the case. The learned Judge was in our opinion right in holding that as the partnership business was carried on within the jurisdiction of the Court at Jhansi, the cause of action arose within that jurisdiction and the suit was maintainable in that Court. No doubt if there was a specific contract between the parties that the rendition of accounts and the final settlement thereof should take place at Cawnpore and that payments should be made there and not at the place where the business was carried on, the Court at Jhansi would not have jurisdiction. But in the present case it has not been satisfactorily established that there was a contract of the description alleged by the defendant. The learned Judge came to no definite finding on the point, though it seems from his remarks that he was not inclined to accept the view of the learned Subordinate Judge. We have looked into the evidence and we are unable to say that the evidence is so clear and satisfactory as to warrant the conclusion that the contract between the parties was that accounts should be taken at Cawnpore and Cawnpore only and that payments should be made there. In this view we think the order of the Court below remanding the case is correct. We accordingly dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 403 (1)

BANERJI AND LINDSAY, JJ.

Sirajuddin—Appellant.

v.

Sharfuddin and others—Respondents.

First Appeal No. 158 of 1917 Decided on 26th February 1919, from decree of Sub-Judge, Agra, D/- 10th February 1917.

Civil P. C. (1908), O. 26, R. 14—Partition suit—Time fixed for filing objections to Commissioner's report—Court can refuse to hear objections filed beyond time.

In a partition suit the Court has inherent power to fix a time within which objection to the Commissioner's report are to be filed, and if its order is not complied with the Court is fully justified in refusing to hear the objections.

[P 403 C 2]

Narain Prasad Asthana—for Appellant.

S. K. Dar and Baleshwari Prasad—for Respondents.

Judgment.—We think there is no force in this appeal. A preliminary decree for partition was made and a Commissioner was appointed to make the partition. He submitted his report on 29th January 1917 and on that date the Court ordered that the parties should file objections, if any, within ten days. Notice of this order was given to the pleaders for the parties. The 10th February 1917 was fixed for hearing. On that date the defendant-appellant, who had not filed any objections within the ten days, put in a petition of objections. The Court declined to hear them and made an order accepting the Commissioner's report and made a final decree. It is contended that the Court had no power to fix any particular period for the filing of objections and that it was bound to hear and decide them before it made its final decree. We do not agree with this contention. The Court had inherent power to fix a time within which objections were to be filed and if its order was not complied with the Court was fully justified in refusing to hear the objections. The Court was never asked to extend the time for the filing of objections, nor was it asked to adjourn the hearing. We dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 403 (2)

WALSH AND RYVES, JJ.

Jai Chand—Plaintiff—Appellant.

v.

Girwar Singh—Defendant—Respondent.

Second Appeal No. 321 of 1917, Decided on 17th June 1919, from decree of Sm. C. C. Judge, Cawnpore, D/- 13th December 1916.

(a) Practice—Pleadings—Defendant setting up title by adverse possession—He cannot contend in appeal that license pleaded by plaintiff was not proved nor its revocation.

In a suit for ejectment the plaintiff's case was that the defendant had been put in possession for certain purposes by leave and license. The defendant denied the license and set up an adverse title, but in appeal to the High Court it was urged on his behalf that it was not proved that the license was ever granted or revoked;

Held: that the plaintiff having based his case upon the license, from the moment the defendant repudiated the license and set up adverse possession, it was no longer possible for him to rely upon the license, or to deny its revocation, and that his position was that of a trespasser

without any defence unless he established his title by adverse possession. [P 404 C 1]

(b) Adverse Possession—Burden of proof—On plea of adverse possession by defendant burden is not on plaintiff but on defendant to prove adverse possession—Evidence Act (1 of 1872), Ss. 102 and 103.

On the defendant's plea of adverse possession the lower appellate Court, holding that the onus lay on the plaintiff to prove not only his title but also his possession within 12 years of the suit, dismissed the suit. In appeal to the High Court:

Held: that the decision of the lower appellate Court was erroneous in law, which was that the onus of establishing a title to property by reason of possession for a certain stipulated period lay on the person asserting such possession. [P 404 C 2]

Tej Bahadur Sapru—for Appellant.

Baldeo Ram Dave and Surendra Nath Sen—for Respondent.

Walsh, J.—This appeal must succeed. The plaintiff is the zamindar of the village and his title has been held established in both Courts. He alleges that the defendant was put in possession for certain purposes unnecessary to mention, by leave and license. The defendant denied the license in his written statement and set up an adverse title. Mr. Baldeo Ram for the defendant says that it is not proved that the license was ever granted or revoked. In our opinion that is now immaterial. The plaintiff based his case upon it and from the moment that the defendant repudiated the license and set up adverse possession, it was no longer possible for the defendant to rely upon the license or to deny its revocation. He was in the position of a trespasser without any defence to the suit, unless he succeeded in establishing his title by adverse possession. With reference to that part of the case, I propose to cite two passages from the judgment of the lower appellate Court. Having held that the plaintiff had shown title the learned Judge said;

"It is equally obvious that the appellant failed to substantiate his allegation of adverse possession. It was not at all asserted when the title of the zamindar was denied and his own asserted."

This being so, there is no finding of adverse possession and in our opinion the defence fails and the plaintiff is entitled to succeed. The reason why the Judge in the lower appellate Court gave judgment for the defendant is contained in the following words which I propose to quote, for the reason that, in my opinion a false impression of what is the actual law has prevailed for a very considerable time in the lower Courts. There is at

least one authority in the Law Reports of this Province by which the lower Courts, unless they happen to be familiar with the Privy Council decisions, may reasonably hold themselves bound, and it is high time that a clear indication was given as to the actual law as it stands at the present moment in this Province, as throughout India upon this question. The learned Judge says:

"In this case which was an action for ejectment, where the defendant advanced the plea of adverse possession, in my opinion the onus lay on the plaintiff-respondent to prove not only his title but also his possession within 12 years of the suit. It was held in *Inayat Hussain v. Ali Hussain* (1) that the plaintiff should lay the foundation for his case by proving that he was in possession of the land within limitation."

In our view that is not the law and never has been the law in this or in any other Province in India. The matter was recently made perfectly clear by an important decision of the Privy Council reported as *Secy. of State v. Chelikani Rama Rao* (2). The importance of that decision is this. The Madras High Court in that particular case had followed a view which the Madras Court had been taking from time to time since the year 1885; the same view apparently as that which is declared in *Inayat Husen v. Ali Husein* (1), namely, that in a suit by an owner of property for possession, to which Art. 144, Lim. Act, applied, the plaintiff had to show what is called a subsisting title. The Privy Council overruled that decision and in doing so clearly overruled the three antecedent decisions of the Madras High Court cited and relied upon in the judgment of the Madras High Court which was under review, and they did so in language contained in the opinion of Lord Shaw which to our mind is as binding upon us and upon inferior Courts of this Province as any Statute can be:

"There Lordships, says Lord Shaw, are of opinion that the view thus taken of the law is erroneous. Nothing is better than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say: 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by

(1) [1898] 20 All. 182.

(2) A. I. R. 1916 P. C. 21=35 I. C. 902=43 I. A. 192=39 Mad. 617 (P. C.).

the case of India... It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

We hold ourselves bound by that declaration of the law and compelled to say that *Inayat Husen v. Ali Husein* (1) and similar cases are no longer law, and inasmuch as the lower appellate Court has held itself bound by *Inayat Husen v. Ali Husein* (1), we must reverse its decision.

I now propose as shortly as I can in justification of our view that the law is really settled and has only become unsettled by misunderstanding, to mention the history of the authorities upon this subject. The point arose in *Parmanand Miser v. Sahib Ali* (3), where it was disposed of by a three Judge Bench. It is important to observe that the character of the suit in that case was one to which Art. 142, Lim. Act would have applied.

"There is a clear distinction, they said: 'as to the onus of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least prima facie evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted was lost.'"

In *Jafar Husain v. Mashuq Ali* (4) the same question as to burden of proof in cases of adverse possession arose in a suit to which also Art. 142 of the present Act would have been applicable, and the Chief Justice in his judgment in that case again made the matter perfectly clear. He said:

"We are satisfied that where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and when the defence is adverse possession, the question of limitation becomes a question of title; the plaintiff must at least give some prima facie evidence to satisfy the Court in the first instance that he was in possession within twelve years before the defendant can be called upon to make out his defence of twelve years' adverse possession."

Whether the expression that the question of limitation becomes a question of title is accurate or not, that case makes it quite clear that there is a clear distinction between cases such as those covered by Art. 142 where the plaintiff claims possession by reason of dispossession,

and cases such as those covered by Art. 144 where the plaintiff stands upon his title and leaves the defendant to show that he has lost it. And the decision which I have just cited from *I. L. R. 14 Allahabad: Jafar Husain v. Mashuq Ali* (4) was itself based upon a decision of the Privy Council reported as *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (5), where their Lordships held:

"That the claimants had shown that they were formerly proprietors of the land to which they alleged title but they had been dispossessed some years before the suit was brought by them and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years next proceeding the suit."

The action being one to which Art. 142, Lim. Act, applied, it was on the claimants or plaintiffs to prove their possession at some time within the 12 years. The reasoning of that decision, if it is not presumptuous to say so, is quite clear. Where a plaintiff comes into Court complaining of dispossession, and founds his cause of action upon a specific act of the defendant of that kind, it stands to reason that inasmuch as he is compelled to establish a cause of action of some kind, within limitation he must show that he was in possession within limitation; otherwise he could not have been dispossessed, and dispossession is the grievance of which he complains. So that in our opinion at any rate down to the year 1897 the law as enunciated by this Court was based upon the decision of the Privy Council and ought to have been accepted without controversy. Unfortunately a case crept into the Law Reports which is difficult to explain and certainly never should have been reported, namely, the case upon which the learned Judge has acted in this particular decision. That is the case of *Inayat Husen v. Ali Husen* (1). We are not concerned to say whether or not the case in point was rightly decided, but the vice of the decision is contained in a sentence in the judgment which I propose to quote and which unfortunately formed a prominent feature of the head-note.

"It is contended," said the Court "that the suit is governed by Art. 144 and the burden of proof was on the defendants to establish adverse possession alleged by them. In our opinion in every suit for possession, the plaintiff must prove not only a legal title to

(5) [1889] 16 Cal. 473=16 I. A. 23 (P.C.)

(3) [1889] 11 All. 433.

(4) [1892] 14 All. 193.

possession, but a subsisting title not barred by the law of limitation."

Where that statement of the law came from it is impossible to say. It is sufficient to say that it is inconsistent with the Privy Council decision in *Mohima Chander Mozoomdar v. Mohesh Chunder Neoghi* (5) and has been definitely overruled by the Privy Council in *Secy. of State v. Chelikani Rama Rao* (2). Inasmuch as the attention of the Privy Council was directed to the several Madras decisions it is not likely that *Inayat Husen v. Ali Husen* (1) was cited to them. It so happens that each of us sitting alone on different occasions has taken the same view of the law as we think is now established. I happen myself to have expressed my opinion in a judgment which was reported as *Muham-mad Kamil v. Habibullah* (6), where the District Judge had taken the same view as the District Judge in this case and had based himself upon the same authority; and recognizing the danger of holding this view I went out of my way to point out that the Privy Council had really removed all possible misunderstanding upon the question and that any cases in this country which had laid down the law to the contrary must be taken to be no longer binding. I observe that in his supplement to the most recent addition of his book Mr. Rustomji refers to that report and says that my observation must be received with some degree of caution. I hope that advice will always be followed with every observation of mine which happens to find its way into reported cases. The only value of a reported case is the bearing of the principle enunciated upon the particular facts of the case and, therefore the observations in the judgment must always be received and examined with a degree of caution. But inasmuch as what I said has been referred to in the text-book in question, I have taken the trouble again to review the citation of cases in Mr. Rustomji's note and the various decisions on which I had arrived at the conclusion I had formed. I cannot find anything in Mr. Rustomji's note to shake the view which I have expressed more than once that the Privy Council decision in *Secy. of State v. Chelikani Rama Rao* (2) has in effect overruled the Madras cases and *Inayat Husen v. Ali*

(6) [1917] 37 L. C. 791.

Husen (1). And I think it is not saying too much to ask the inferior Courts, when this question arises again, as it undoubtedly frequently arises, to pay attention to these observations and to examine the Privy Council decision and no longer to hold themselves bound by the decision in *Inayat Husen v. Ali Husen* (1).

Ryves, J.—I agree generally. The finding of the lower appellate Court is: "The fact remains that the plaintiff is the zamindar and the defendant has been in long possession of the land."

It has also found that the possession of the defendant has not been proved to have been adverse. That being so, it seems to me that since the publication of the ruling of the Privy Council reported as *Secy. of State v. Chelikani Rama Rao* (2), the plaintiff must succeed inasmuch as the defendant has failed to prove his adverse possession. I concur in the order proposed.

By the Court.—For these reasons our order is that the appeal must be allowed with costs, including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 406

TUDBALL AND RAFIQUE, JJ.

Bal Krishna Das and another—Plaintiffs—Appellants.

v.

Hira Lal and others—Defendants—Respondents.

First Appeal No. 11 of 1916, Decided on 22nd October 1918, from decree of Sub-Judge, Benares.

Hindu Law—(Alienation—Rule limiting sale for discharge of valid debt to extent of debt only is not applicable to property which cannot be sold piecemeal.

Where rule limiting the sale of property for the discharge of a valid debt to only so much as is commensurate with the amount of the debt, has no application in the case of a house which is an indivisible parcel of property that cannot be sold piecemeal. Where a daughter, in order to discharge her father's debt, sold a house inherited from him, and realized a sum much in excess of the amount of the debt:

Held: that the sale was not invalid.

[P 409 C 1]

Sital Prasad Ghosh and Lalit Mohan Banerjee—for Appellants.

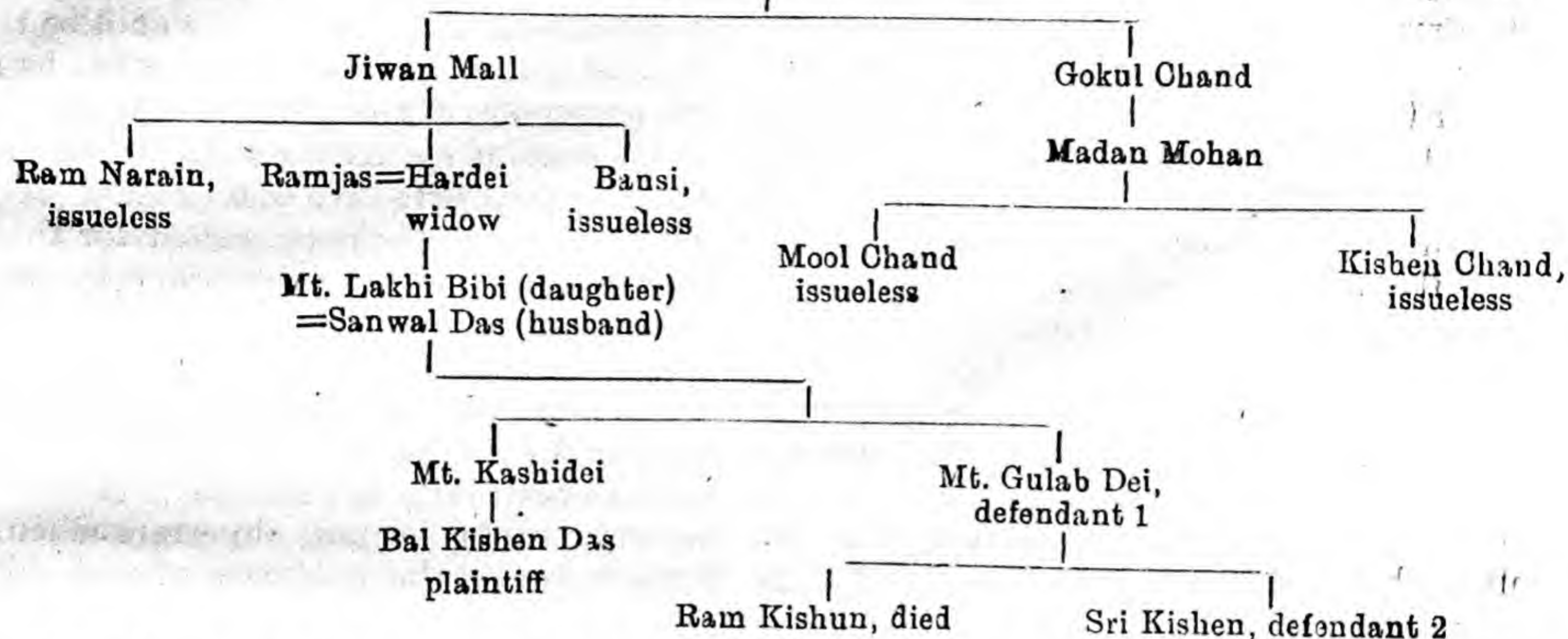
Tej Bahadur Sapru, B. E. O'Connor and Harendra Krishna Mukerjee—for Respondents.

Rafique, J.—The following pedigree will explain the right under which the

plaintiff has come into Court for the re- liefs that he seeks:

MILKHI MALL

Balakram



Ramjas was the maternal great-grandfather of the plaintiff. Ramjas died in 1853 leaving him surviving a widow, Mt. Hardei Bibi, and a daughter, Mt. Lakhi Bibi. He left no male issue. According to the evidence in the case he died possessed of a house in Cotton Street, Calcutta, and certain moveables. Soon after his death his widow and daughter left Calcutta and took up their residence in Benares. Mt. Hardei Bibi died on 15th June 1869. In 1888 the village Mahrani was mortgaged to Mt. Lakhi Bibi by Sadanand Misra. Ten years afterwards on 7th July 1898 the village was sold to Mt. Lakhi Bibi. On 6th May 1900 she mortgaged it to one Nur Mohammad in lieu of Rs. 20,000. The money was ostensibly raised to help Gopi Nath, a friend of her husband, Sanwal Das. The mortgage to Nur Mohammad was a simple mortgage. He sued on foot of the mortgage to recover the money due on it. The claim was brought against both Mt. Lakhi Bibi and her husband, Sanwal Das. The latter, it may be mentioned here, pleaded inter alia that his wife had no interest in the village of Mahrani and could not create a valid mortgage on it. He claimed the village as his own property. The case was however compromised and a decree was passed on 2nd May 1905 under which Nur Mohammad was put into possession of the village as a usufructuary mortgagee. Mt. Lakhi Bibi died on 23rd April 1906. Ram Kishen, the cousin of the plaintiff, died on 17th April 1910, and Sanwal Das, the maternal grand-

father of the plaintiff, died in 1909. Mt. Lakhi Bibi had before her death sold the Calcutta house of her father on 7th March 1878 to Mts. Dhani Bibi and Soni Bibi for Rs. 19,500. According to the recital in the deed and the pleas in defence, the house was sold to pay off the debt of Ramjas.

On 16th January 1911 the plaintiff Bal Krishna Das instituted the suit out of which this appeal has arisen, for the recovery of 1/3rd of the house and village on the allegation that the sale of the house by Mt. Lakhi Bibi was invalid and made for no legal necessity and that the village Mahrani had been purchased by her out of the funds left by Ramjas and that the mortgage created on it by Mt. Lakhi Bibi was also of no validity as against him, inasmuch as it was not created for legal necessity. He impleaded as defendants in the case the representatives of the original vendees of the house and Nur Mohammad, the mortgagee, as also his aunt Mt. Gulab Dei and his surviving cousin Sri Kishen. The claim against his aunt and against his cousin was for moveables and a grove alleged to have belonged originally to Ramjas. During the pendency of the suit a compromise was entered into between him on the one side and Mt. Gulab Dei and Sri Kishen on the other. Under the said compromise the plaintiff withdrew his claim as to moveables and the grove against Gulab Dei and Sri Kishen and they on their side relinquished their right in the 2/3rds of the Calcutta house and the village Mahrani in favour of the

plaintiff. The latter then applied to the lower Court for amendment of the plaint asking that his claim should be extended to the entire house and the village against the other defendants. The lower Court disallowed his prayer, but on appeal to this Court the plaintiff was permitted to amend his plaint. The case therefore went to trial as against the other defendants in respect of the entire house and the village. After carefully considering the evidence produced by the parties before it, the lower Court held that the Calcutta house had been sold by Mt. Lakhi Bibi for legal necessity and that the village of Mahrani was purchased by her out of her own funds and not out of any left by Ramjas. The claim was accordingly dismissed. The plaintiff has come up in appeal to this Court and challenges the findings of the Court below against him. The other appellant Har Krishna Das is a transferee of a portion of the interest of the plaintiff and hence appears on the record. It is said that he purchased a portion of the interest of the plaintiff subsequent to the decree of the lower Court but before the filing of the appeal to this Court.

It is contended on behalf of the appellants that there is no evidence or at least no evidence worth the name which can be relied upon to prove that there was any legal necessity for Mt. Lakhi Bibi to sell the Calcutta house in 1878. On the other hand there is ample evidence on behalf of the appellants to show that Ramjas was a man very well off, who left cash, jewellery and furniture, that Mt. Lakhi Bibi eventually inherited and it was out of the moneys inherited from her father that she purchased the village of Mahrani. Further it is urged that even if it be conceded that Ramjas died leaving a debt of about Rs. 8,000 and that he left no other property than the Calcutta house, Mt. Lakhi Bibi should not have sold the house, but paid off the debt by leasing or mortgaging the house or raising the money in some other way. The evidence of the witnesses that is printed in the appeal before us and which bears on the question of the position of Ramjas, consists of the statements of seven men including the plaintiff himself. Most of them say that Mt. Lakhi Bibi inherited wealth from her mother Mt. Hardei Bibi who in her turn had got it from Ramjas, but almost all of them

had to admit in cross-examination that their knowledge is not first hand and is based on hearsay. It is in evidence that Ramjas kept account-books.

The persons who would presumably be in possession of those books would be the descendants of Ramjas. They must be in the possession of the plaintiff himself or of his aunt or his cousin with whom he has compromised. He could easily have produced those books or called for their production to prove what property was left by Ramjas other than the Calcutta house. They would have also been of importance as rebutting the evidence against the defence about the debt alleged to have been left by Ramjas. It would serve no useful purpose by reproducing here at length the evidence of each witness and showing that none of the witnesses purports to give first hand evidence.

We have therefore no reliable evidence before us that Ramjas died a wealthy man and left considerable cash and jewellery in addition to the Calcutta house. The village Mahrani was mortgaged by Mt. Lakhi Bibi in 1888, 35 years after the death of her father and 19 years after the death of her mother. It is in evidence on behalf of the plaintiff himself that Mt. Lakhi Bibi had money and that her husband Sanwal Das, made and lost lacs of rupees. We would particularly refer to the evidence on this point of Raja Munshi Madho Lal and of Jewa Nand Misser. The latter is the purohit of the plaintiff and his family. He would be a person in a position to know the family affairs of the plaintiff. It is quite conceivable that Sanwal Das, though an extravagant man, gave money to his wife to provide for her in case he came to grief. Anyhow the onus was on the plaintiff to prove that the village Mahrani was purchased by Mt. Lakhi Bibi out of the funds left by her father, which onus, in our opinion, has not been discharged. If the village was not bought out of the funds left by Ramjas, it is immaterial to speculate as to where she got money from to buy it. As the plaintiff has not proved that the village Mahrani was purchased out of the funds left by Ramjas, his claim to it must fail. The next question is as to the validity of the sale of the Calcutta house. The evidence for the defence proves beyond a shadow of doubt that Ramjas at the time of his death

was indebted to the extent of about Rs. 8,000 to one Moti Chand. The latter pressed for his money and Mt. Lakhi Bibi and her mother raised the money by executing a mortgage on the house and paid off Moti Chand. One Ganga Prasad advanced the money.

He transferred the mortgage to Ram Kishen. In the meantime Mt. Lakhi Bibi, it seems, kept the mortgage debt down by paying off portions of the principal and some interest. Ram Kishen however was not satisfied and he pressed for payment. In March 1878 Mt. Lakhi Bibi sold the house to Mts. Dhan Bibi and Soni Bibi for Rs. 19,500, out of which Rs. 7,775 were paid in discharge of the mortgage to Ram Kishen. These facts are proved by the evidence of Nobin Chandar and Kaniram and some documents. It is also in evidence that the purchasers of the house made enquiry as to the alleged debt of Ramjas through their solicitor, one Mr. Pitter. Mr. Pitter, after making regular enquiries, came to the conclusion that the allegation of Mt. Lakhi Bibi that her father had died indebted was correct and that she was selling the house to enable her to pay off that debt. The debt at the time was at least 25 years old and at the time of the sale the debt was increasing. We have therefore no hesitation in holding on the evidence in the case that the sale of the house by Mt. Lakhi Bibi was for legal necessity. It is however urged on behalf of the appellants that she need not have sold the house but should have resorted to some other measure to raise the money and pay off the debt of her father. For example, it is suggested that she should have either mortgaged or leased the house for a long term and thus raised the money. There is no force in the argument. She had mortgaged the house and found that the debt was increasing and she was not in a position to pay it off.

Had the mortgage continued the house would have gone to the mortgagee by the swelling of the interest. As to the lease for a long term of years we have no data to go upon, nor is there any ground for us to say that she could have made a better bargain by selling a portion of the house in Calcutta. As far as we can judge from the evidence in the case, the house was an indivisible parcel of property that could not be sold piecemeal. It has

not been shown to us that the sale of the house was for an inadequate price. The present value of the house, after it had been added to and built upon by the purchasers, is no indication of its value in 1878. Even if no additions had been made the value of the house would have actually been much more now than it was in 1878, for it is a well known fact that the price of immovable property has gone up enormously all over the country, particularly in a town like Calcutta. In the circumstances of the present case, considering that Mt. Lakhi Bibi had no other means of paying off the debt of her father, the course adopted by her was a perfectly legitimate one. We would also remark here that the plaintiff has brought his suit after a lapse of a number of years, nearly 33 years. He waited until the persons who were in a position to throw light on the transaction were all dead. His maternal grandfather, Sanwal Das, died only two years prior to the suit. Had he been alive he would have given us more detailed information about the sale of the house. The plaintiff was questioned on the point and he replied that he could not sue earlier because Sanwal Das always put him off by saying that he, Sanwal Das, would bring about a compromise with the vendees and the mortgagee, Nur Muhammad. The explanation on the face of it is absurd. We think that the Court below came to a correct finding with regard to the sale of the Calcutta house. The claim of the plaintiff was rightly dismissed. The appeal fails and we dismiss it with costs. The two sets of respondents will be entitled to their separate costs.

V.B./R.K.

Appeal dismissed.

*A. I. R. 1919 Allahabad 409

PIGGOTT AND WALSH, JJ.

Sundar Bai—Plaintiff—Appellant.

v.

Basdeo Singh and others—Defendants—Respondents.

Second Appeal No. 1657 of 1917, Decided on 30th October 1918, from decree of Dist. Judge, Benares.

(a) Civil P. C. (5 of 1908), O. 32, R. 15—Party becoming of unsound mind during course of litigation—Court is bound to proceed under O. 32.

The duty of appointing a guardian or next friend to look after the interests of a litigant afflicted with the legal disability of unsoundness of mind is laid upon the Court in two sets of

circumstances only. If a person has been adjudged to be of unsound mind by order of a competent Court, then no suit can be brought by or against such a person unless subject to the provisions of O. 32, further if during the course of a litigation the Court finds on inquiry that anyone of the parties before it is, by reason of unsoundness of mind or mental infirmity, incapable of protecting his own interests, the Court is bound to take action under the aforesaid Order. [P 412 C 1, 2]

(b) Civil P. C. (5 of 1908), S. 47—Decree or order passed while under legal disability of unsoundness of mind—Suit to set aside is maintainable—Specific Relief Act (1 of 1877), S. 42.

A suit, by a person against whom a decree has been passed or an order made at a time when such person was suffering under the legal disability of unsoundness of mind, to set aside the decree or order is maintainable and is not barred either by S. 47, Civil P. C., or by S. 42, Specific Relief Act. At the same time a person who has once been lawfully a party to a suit and who at the date of the institution of that suit was not afflicted with any legal disability, is not necessarily entitled to have the decree or order of the Court disturbed, merely upon a finding that the legal disability of unsoundness of mind had supervened before that decree or order was passed. The matter must depend upon the facts of the case and the equities arising therefrom. [P 412 C 2]

*** (c) Civil P. C. (5 of 1908), O. 32, R. 15—Plaintiff becoming of unsound mind during progress of suit—Fact not brought to notice of Court—Failure to appoint next friend—Decree is not liable to be set aside.**

Plaintiff instituted a suit to obtain cancellation of an instrument, and during the trial of the suit the Court upon an application made on behalf of the plaintiff permitted the suit to be withdrawn subject to the payment of the defendants' costs. In execution of their order for costs the defendants attached the plaintiff's property, whereupon a suit was brought on the latter's behalf for a declaration that the decree or order granting costs was as against the plaintiff, a nullity, inasmuch as the plaintiff was of unsound mind at the time when the decree was made and the provisions of O. 32, R. 15, had not been complied with:

Held: that the matter not having been brought to the notice of the Court before the passing of the decree, the provisions of R. 15, O. 32 were not applicable to the case and the decree was not liable to be set aside. [P 412 C 2]

Kailas Nath Katju—for Appellant.

Peary Lal Banerji—for Respondents.

Piggott, J.—This is a second appeal by a plaintiff whose suit has failed in both the Courts below. The object of that suit was to obtain a declaration that a certain decree or order passed on 13th October 1909, in another suit instituted by this same plaintiff, is void and ineffectual against her, together with such subsidiary relief in the way of preventing the decree-holders from executing the said decree as the Court might think necessary and suitable. The Courts be-

low have dismissed the suit, in part upon a finding of fact as to the soundness of the plaintiff's mind on the date on which that suit was instituted, and in part also on the view that it is barred either by S. 47, Civil P. C., or by S. 42, Specific Relief Act, or both. When the appeal first came before this same Bench in the month of June last, we were of opinion that the finding of fact on which the Courts below had proceeded was not sufficient, because it was necessary for us to know what was the state of the plaintiff's mind on the date on which the decree complained of was passed, that is to say, on 13th October 1909. We also felt considerable doubt whether we could agree with the view of the law upon which the Courts below had held this suit not to be maintainable at all. We accordingly remitted an issue to which a certain finding has been returned. The question of the effect of that finding has been debated before us and must be disposed of at once.

The defendants-respondents have taken objection to this finding, substantially on the ground that it is expressed in doubtful language and should not be treated as a definite or satisfactory determination of the issue remitted by this Court. Now the learned District Judge had before him evidence on which it was undoubtedly open to him, as a matter of law, to come to a finding that Mt. Sundar Bai was of unsound mind or by reason of unsoundness of mind or mental infirmity incapable of protecting her own interests on 13th October 1909. He found the question a very difficult one to determine and it is not surprising that he should have done so. The limits which separate infirmity of mind, or eccentricity from such mental incapacity as is referred to in R. 15, O. 32, Civil P. C., are necessarily narrow, and it must often be difficult for the Court charged with the responsibility of coming to a conclusion of fact upon such a point to arrive at such conclusion with certainty. In the present case moreover the position was further complicated by the fact that another learned Judge, the predecessor-in-office of the Judge by whom the remand finding was returned, has come to the conclusion that this plaintiff was of sound mind and legally capable of looking after her own interests on the date on which the suit which resulted in the order complained

of was instituted. Under the circumstances it cannot fairly be objected to the learned Judge of the Court below that he has frankly admitted that he found considerable difficulty in arriving at a conclusion. We think however that he has returned a clear finding to the issue remitted by this Court, that this is in substance a finding of fact and that we are bound to accept it as such. As regards the questions of law discussed in the judgment under appeal, it seems to us that they can be briefly disposed of. There is certainly nothing in S. 47, Civil P. C., which bars a suit like the present. To hold the contrary would be to make it impossible for a person against whom a decree had been passed during his minority, without his ever having been properly represented in the litigation, to obtain any relief against the said decree. In fact such a suit as that which was finally decreed by their Lordships of the Privy Council in *Partab Singh v. Bhabuti Singh* (1) would not be maintainable at all, if the principles upon which the lower appellate Court has proceeded in deciding the first appeal in this case were correct. The same decision is authority also for the proposition that S. 42, Specific Relief Act cannot be applied so as to bar this suit in the manner in which it has been used by the Courts below.

In view of the decision which I have come to however I do not think it necessary to discuss the questions of law above referred to at any length. In my opinion the present suit was maintainable and could not be dismissed as it was in limine upon the grounds taken by the Courts below. But it is one thing to say that a suit maintainable and another thing to lay down precisely what facts the plaintiff must be held bound to prove in order to obtain a decree. In the present case I think the plaintiff was not entitled to a decree of the nature sought and the order complained of, passed on 13th October 1909, is one which it was within the jurisdiction of the Court to pass at that time; it seems to me a proper order for the Court to have passed and one which this plaintiff is not entitled to have set aside. It must be remembered that we are bound to hold, on the findings arrived at by the Court of first appeal, that the

plaintiff was of sound mind and capable of protecting her own interests when she instituted Suit No. 70 of 1909 which resulted in the order now complained of. The object of that suit was to set aside a certain sale deed which this plaintiff had executed on 16th March 1909. Somewhere between the date of the institution of the suit and the order of the 13th October 1909, the plaintiff became afflicted with the legal disability of unsoundness of mind. She had been examined by the Court on 2nd October 1909, and it is clear that nothing which took place during her examination had in any way excited the suspicion of the Court, or suggested to any person the plea that the plaintiff had now become of unsound mind and incapable of prosecuting her own suit. Nor was any representation to this effect made to the Court at any time before it delivered its final decision in the case. The nature of that decision requires to be carefully considered. It proceeded upon a petition presented to the Court by the plaintiff's legal adviser. That petition was presented under O. 23, R. 1 Civil P. C. It was represented that the suit as brought must fail by reason of some formal defect and that the plaintiff ought, under the circumstances, to be allowed to withdraw from the suit with liberty to institute a fresh suit hereafter. Such an application can in the discretion of the Court be granted on such terms as it thinks fit.

We must take it to be common ground now that the application was rightly made, that is to say, that the suit as instituted and then pending before the Court was bound to fail by reason of some formal defect. If the Court had gone on to dispose of the suit, apart from this application for leave to withdraw, it would have dismissed the same. It follows that the defect in consequence of which the suit was bound to fail was one inherent in the frame of the suit itself, and, therefore, one for which the plaintiff had made herself responsible at a time when she was not incapable of protecting her own interests by reason of unsoundness of mind or of mental infirmity. The Court decided that permission to withdraw from the suit with liberty to institute a fresh suit ought to be granted, subject to payment to the defendants of all costs incurred by them up to date. It so happened, and this is the real origin of the present

1) [1913] 35 All. 487=21 I. C. 288=40 I. A. 182 (P.C.).

litigation, that the bill of costs for the defendants was a heavy one. We must however take it as established that the costs therein specified were costs which had actually been incurred. It has never been any part of the plaintiff's case in the suit now before us that a fraud was practised upon the Court in the month of October 1909, by the defendants certifying payment of pleader's fees which had not in fact been paid. The order of the Court, therefore requiring the plaintiff to make good these costs was a reasonable one on the face of it. It was the only fair alternative to a decree dismissing the suit, and the order was passed on the application of the plaintiff's legal adviser.

What has really been contended before us on behalf of the appellant is that upon the finding that the said appellant, as plaintiff in Suit No. 70 of 1909, was suffering from the legal disability of unsoundness of mind on the date on which the order complained of was passed, taken in connexion with the admitted fact that she was not represented by a next friend and that no guardian ad litem had been appointed for her on that date, the plaintiff is of necessity entitled to a decree in her favour. In effect the contention is that the decree so passed is, as it stands, a nullity in law, and that the Courts have no option, on becoming aware of the facts above set forth, but to declare it to be such. This contention is supported by reference to rulings in which the above principles have been affirmed in the case of decrees passed to the prejudice of minors who were not properly represented in the litigation in question. The position of a person of unsound mind is not quite the same as that of a minor. To begin with, minority is not a disability with which a litigant can become affected during the progress of a suit. Consequently in the case of a minor the particular position with which we have to deal in the present case could not possibly arise. In the next place, regard being had to the provisions of O. 32, R. 15, Civil P. C., it is clear that the duty of appointing a guardian or next friend to look after the interests of a litigant afflicted with the legal disability of unsoundness of mind is laid upon the Court in two sets of circumstances only. If a person has been adjudged to be of unsound mind by order of a competent Court, then no suit can be

brought by or against such a person unless subject to the provisions of O. 32, Civil P. C.; further, if during the course of a litigation the Court finds on inquiry that any one of the parties before it is, by reason of unsoundness of mind or mental infirmity, incapable of protecting his own interests, the Court is bound to take action under the aforesaid Order. Neither of these contingencies arose in the suit of 1909. The fact of the plaintiff's unsoundness of mind was never represented to the Court by any of the persons concerned, was never pleaded and was never made a matter of inquiry by that Court. It cannot be said therefore that the Court at the time when it passed the order of 13th October 1909, infringed the provisions of O. 32, R. 15, Civil P. C., or exercised any jurisdiction not vested in it by law.

To sum up therefore my opinion is that, while a suit of this nature, by a person against whom a decree had been passed or an order made at a time when such person was suffering under the legal disability of unsoundness of mind, is maintainable and cannot be defeated on the grounds which have been relied upon by the Courts below; at the same time a person who has once been lawfully a party to a litigation, as for instance, the present plaintiff, who on the date of her institution of the suit was not afflicted with any legal disability, is not necessarily entitled to have the final decree or order of the Court disturbed, merely upon a finding that the legal disability of unsoundness of mind had supervened before that order was passed. The question of the plaintiff's right to a decree in a suit like the present must depend upon the facts of the case and the equities arising therefrom. I think therefore that the Courts below were right in dismissing the suit, though not upon the grounds on which they proceeded. Under the circumstances the plaintiff had some valid grounds for instituting the present appeal, as the defendants in the Courts below had succeeded upon contentions which were, in my opinion, not adequate. It is therefore reasonable that we should leave the parties to bear their own costs of this appeal. I would however dismiss the said appeal for the reasons which I have given.

Walsh, J.—I agree. The circumstances of this case are exceptional and have given

rise to considerable difficulty. I do not agree with the view of the lower Courts that S. 42, Specific Relief Act, is a defence to this suit. S. 42 deals only with declaratory suits. Its object clearly is to prevent multiplicity of suits and undue haste on the part of a litigant who rushes into Court for some fancy grievance. Where, as in this case, a declaration is asked for as a necessary preliminary to the real relief,—which was in this case exemption from liability under a decree, which is a roundabout way of asking for the decree to be set aside,—the section in my judgment does not apply. The decision to which we have come, in my opinion, does substantial justice in the peculiar circumstances of this case. It must not be treated as laying down any principle for the decision of cases in which a party becomes insane pendente lite, and a decree is passed against him in spite of such disability, or without, notice of this disability having been given to the Court.

By the Court.—The appeal is dismissed, the parties to bear their own costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 413 (1)

RYVES, J.

Emperor

v.

Nakchhedi Musahar—Opposite Party.

Criminal Ref. 578 of 1919, Decided on 10th October 1919, by Dist. Magistrate, Ghazipur.

Criminal Tribes Act (3 of 1911), S. 23—S. 23 only requires that there must be previous conviction; whether before or after registration is immaterial.

The operation of S. 23, Criminal Tribes Act, is not confined to offences that have been committed since the convict was registered. The second conviction referred to in the section does not signify that the previous conviction should have been obtained after the registration of the convict. It is enough for the purposes of the section if the convict has been previously convicted, whether before or after his registration.

[P 413 C 2]

Order of Reference.—In this case *Nakchhedi Musahar*, a member of a registered criminal tribe, has been sentenced for an offence punishable under S. 457, I. P. C. The accused was previously convicted for a similar offence on 6th November 1912. At that time *Nakchhedi* had not been registered. The Deputy Magistrate has interpreted S. 23, Cri-

minal Tribes Act, to mean that the section applies only to offences that have been committed since the convict was registered and that a second conviction in that section means a second conviction since the registration of the accused. This view is supported by the wording of the section, which begins "Whoever being a member of any criminal tribe." This suggests that the first and the foremost element required by the section is that the accused should be a member of the criminal tribe, and as such he should be convicted. Moreover, Government Order No. 1131-8-340, dated 13th January 1919, requires any musahar who has been in jail for a nonbailable offence since 1910 to be registered as a member of a criminal tribe. This means that practically every one who is registered has already committed at least one offence, and this being so, it seems hardly necessary to make any mention of a second offence in S. 23. On the other hand there is the ruling reported as *Emperor v. Adhin* (1). In this case it was held that it matters not whether the previous conviction was before or after the registration. In this case the accused does not appear to have been represented, but so long as this judgment stands I have no option but to report the case and recommend that the conviction be set aside and the Magistrate be directed to commit the case to the Court of Session.

Judgment—The case of *Emperor v. Adhin* (1) is binding on me. I must therefore accept the reference and direct the Magistrate to commit the accused to the Sessions.

V.B./R.K. *Order accordingly.*

(1) [1916] 36 I. C. 143.

A. I. R. 1919 Allahabad 413 (2)

RYVES, J.

Avadh Behari Lal—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 918 of 1919, Decided on 22nd September 1919, against order of Addl. Sess. Judge, Mainpuri, D/- 9th August 1919.

(a) **Criminal P. C. (5 of 1898), S. 234—Accused convicted on four counts under Ss. 409 and 466, I. P. C.—He can be tried in respect of three counts only.**

Accused was sent up for trial under Ss. 218, 409 and 466, I. P. C. on eight counts and was convicted on four counts under Ss. 409 and 466.

Held: (1) that having regard to the provisions of S. 234, Criminal P. C., the accused could only be tried on three counts in one trial. [P 414 C 1]

(b) Criminal P. C. (5 of 1898), S. 234—Trial in contravention of S. 234 is illegal.

The procedure adopted in a case if in contravention of the provisions of S. 234 the trial is illegal and must be set aside. [P 414 C 1]

J. M. Banerji—for Appellant.

Govt. Advocate—for the Crown.

Judgment.—In this case Avadh Behari Lal was sent up for trial under Ss. 218, 409 and 466, I. P. C., on eight counts and was convicted on four counts under Ss. 409 and 466. It seems to me that this is in contravention of the plain wording of S. 234, Criminal P. C. According to the ruling of the Privy Council in the well-known case of *Subrahmania Ayyar v. King-Emperor* (1) the trial is illegal. I therefore set it aside and direct that the accused be retried according to law, that is to say on three counts only. Having set aside his conviction, I direct that he be released on his giving bail to the satisfaction of the District Magistrate.

V.B./R.K. Case remanded.

(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P. C.).

A. I. R. 1919 Allahabad 414

RICHARDS, C. J. AND RAFIQUE, J.
Deokinandan—Plaintiff—Appellant.

v.

Mahtab Rai—Defendant—Respondent.

Second Appeal No. 209 of 1918, Decided on 17th February 1919, against decree of Sub-Judge, Meerut, D/- 17th December 1917.

Pre-emption—Village divided into mahals—Vendor and vendee in different mahals—Cosharer of vendor is entitled to pre-empt.

A village which consisted of a single mahal in 1872 was partitioned into different mahals in 1887. The *wajibularz* of 1872 contained an entry as to a custom of pre-emption and in 1887 the different mahals adopted the old *wajibularz*. Plaintiff who was a cosharer in the same mahal with the vendor brought a suit for pre-emption against the defendant vendee who was a cosharer in a different mahal in the village:

Held: that the effect of the partition effected in 1887 was that the proprietors in each of the new mahals ceased to have any community of interest with the proprietors of the other mahals so that as against the plaintiff the defendant vendee was a complete stranger and the plaintiff was therefore entitled to a decree. [P 414 C 2]

S. P. Ghosh—for Appellant.

H. K. Mukerjee for A. H. C. Hamilton—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. Both the Courts below dismissed the claim of the plain-

tiff, who has come here in second appeal. The plaintiff is a cosharer in the same mahal as the vendor. The defendant vendee is a proprietor in another mahal, in the village. It appears that in the year 1872 the whole village constituted one mahal, but in the year 1887 or thereabouts perfect partition took place when a number of new mahals were formed and the defendant vendee is in one of these new mahals. Both the Courts seem to have been of opinion that a custom of pre-emption prevailed, but they thought that because the vendee was a cosharer in the village the pre-emptor had no better right than him and therefore his suit must fail. The evidence of the existence of the custom was the *wajibularz* of 1872. This document contains a clear record as to pre-emption. In 1887 after partition (according to the finding of the Court below) each of the new mahals adopted the old mahal. It seems to us, once we assume that the custom existed, the plaintiff had a right of pre-emption, and that as against him the defendant vendee was a complete stranger. The custom of 1872 was a custom between cosharers. Every proprietor in the village then was a cosharer with the other. The change brought about in the year 1887 was that the proprietors in each of the new mahals ceased to have any community of interest with the proprietors of the other mahals. In short the proprietors of the different mahals ceased to be cosharers with each other. The facts and circumstances connected with the case of *Ganga Singh v. Chedi Lal* (1) are very similar to the present case. It appears that the Court of first instance found the amount of consideration proved. We therefore allow the appeal, set aside the decree of both the Courts below and in lieu thereof decree the plaintiff's claim for pre-emption of the property conditional upon his paying the sum of Rs. 250 within three months from this date. If he fails to pay the money within the time allowed, the suit will stand dismissed with costs in all Courts. If the money is duly paid in, the plaintiff will have his costs in all Courts. Costs in this Court will include fees on the higher scale.

V.B./R.K.

Appeal allowed.

(1) [1911] 33 All. 605=12 I. C. 98.

A. I. R. 1919 Allahabad 415

RAFIQUE AND LINDSAY, JJ.

Ram Singh and others—Plaintiffs—Appellants.

v.

Chet Ram and others—Defendants—Respondents.

First Appeal No. 181 of 1916, Decided on 11th March 1919 against decision of Sub-Judge, Meerut, D/- 31st March 1916.

(a) Hindu Law—Debt—Father—Antecedent debt—Meaning of, explained.

Where a Hindu father borrows money on the security of the joint estate and there is nothing to show that the money is advanced to him on his personal credit the debt does not fall within the definition of antecedent debt and is not binding upon his sons. An obligation incurred by a father in order to be binding upon his sons must be one incurred antecedently to the transaction in suit and one incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be made available by such joint estate. [P 416 C 1]

(b) Hindu Law—Debts—Father—Pious obligation to pay off lies on sons and not upon grandsons during life-time of their father.

The doctrine of pious obligation of Hindu sons to pay off their father's debts is based on spiritual considerations apart from the ownership of any property and comes into operation only against the sons, or in case of their death, against the grandsons. Where the sons are alive the pious obligation to pay the debts of their father lies upon them and not upon their sons. [P 416 C 2, P 417 C 1]

Tej Bahadur Sapru and N. P. Singh—for Appellants.*Baldeo Ram Dave*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the grandsons of one Amar Singh to recover possession of property conveyed by him by a sale deed, dated 16th July 1907. Amar Singh, it seems, had two sons, Bharat Singh and Kehar Singh, both of whom are alive. Bharat Singh has one son called Ram Singh, and Kehar Singh has two sons, named Mahabir Singh and Gajraj Singh. On 23rd March 1904, Amar Singh executed a deed of mortgage of the property in suit for Rs. 8,000 in favour of Chet Ram and Himmat. Three years after, that is on 16th July 1907, Amar Singh executed a deed of sale in respect of the mortgaged property in lieu of Rs. 13,500 in favour of the mortgagees, i. e., Himmat and Chet Ram. Rs. 8,000 were set off towards the payment of the mortgage of 23rd March 1904, and Rs. 5,500 were paid in cash before the Sub-Registrar to Amar Singh. One Dalip Singh brought a suit to recover a portion of the property sold on the ground of pre-emption.

He obtained a decree and subsequently sold the property to Jawahir Singh. The sale deed of 1907 was attested among others by the two sons of Amar Singh. The latter died in 1909.

On 24th July 1915 the suit out of which this appeal has arisen was brought by his grandsons against Chet Ram, Jawahir Singh, Dalip Singh and the sons of Himmat. The plaintiffs impleaded their fathers as pro forma defendants in the case. The claim was brought on the allegation that Amar Singh was a man of immoral character; that the property sold on 16th July 1907 was joint ancestral property that it was sold for no legal necessity; that full consideration had not passed either on the sale deed or on the mortgage; that the signatures of the sons of Amar Singh were obtained under coercion, and that the property was sold for an inadequate price. The defendants resisted the suit by traversing all the allegations made in the plaint and further adding that they had made reasonable inquiry before entering into the transaction of sale and were satisfied that the property was sold for necessity and that they were bona fide purchasers for value. The learned Judge of the lower Court held that the description of Amar Singh's character had been considerably exaggerated on both sides and that the most that could be said on the evidence in the case was that he had not led a moral life. Further the learned Judge held that full consideration had passed both on the mortgage and the sale deed; that the allegation of coercion as to the signatures of the plaintiffs' fathers was not proved; that the value of the property was Rs. 13,500 and that the sum of Rs. 8,000, that is the mortgage money, fell under the definition of an antecedent debt and that the sale was good to that extent; as to the balance of Rs. 5,500 he found that it was the pious duty of the plaintiffs to discharge the debt of their grandfather and hence they were bound to pay it. He accordingly decreed the claim of the plaintiffs for the recovery of 11/27ths of the property in suit on the payment of Rs. 5,500. The money was to be paid within three months or the suit of the plaintiffs was to stand dismissed.

In appeal to this Court it is contended on behalf of the plaintiffs that in view of the pronouncement of their Lordships of

the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* (1) the mortgage of 1904 does not fall within the definition of an antecedent debt. As to the liability of the plaintiffs to pay Rs. 5,500 before recovering the proportionate amount of the property, it is contended that as their fathers, that is, the sons of Amar Singh, are still alive there is no pious obligation on the plaintiffs to discharge the debt of Amar Singh. To take up the question of antecedent debt first. In the Privy Council case already referred to their Lordships observe as follows :

"In their Lordships' opinion, these expressions, which have been the subject of so much difference of legal opinion do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him but are joint family property."

It is apparent from this expression of opinion that the obligation incurred by a father which would be binding upon his sons must have two attributes, namely, first, that it must have been incurred antecedently to the transaction in suit, and secondly, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. In the present case the sum of Rs. 8,000 was borrowed by Amar Singh on the security of the joint estate. There is nothing to show that the money was advanced to him on his personal credit. In fact on the contrary it appears that the mortgage was a usufructuary mortgage under which Amar Singh the mortgagor incurred no personal liability. Applying therefore the test laid down in the case of *Sahu Ram Chandra v. Bhup Singh* (1), we find that the mortgage of 1904 cannot be considered to be an antecedent debt as defined in the said case. The point was again considered by their Lordships of the Privy Council in the

case of *Jogi Das v. Ganga Ram* (2), where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chandra v. Bhup Singh* (1) as follows :

"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

A similar point arose in the case of *Brij Narain Rai v. Mangala Prasad* (3) decided by a Bench of this Court to which one of us was a party. It was held in that case :

"that the mortgage in suit, having been ostensibly created in order to pay off two prior mortgages, that is, debts which had been incurred prima facie on the security of the joint family property would not in view of the decision in *Sahu Ram Chandra v. Bhup Singh* (1) be one created to pay off antecedent debts"

The next point to be considered in the appeal is the obligation of the plaintiffs to pay the sum of Rs. 5,500 before recovering any portion of the property. The lower Court has found on the evidence in the case that the plaintiffs have failed to prove that the sum in question was borrowed by Amar Singh for immoral purposes and on the other hand the contesting defendants have not proved that the money was taken for any legal and valid necessity. But as the money actually passed the lower Court, in view of some of the authorities cited before it, held that the plaintiffs were under a pious obligation to pay the said sum. In connexion with this point we would here refer to an argument urged on behalf of the defendants-respondents by their learned counsel to the effect that even if Rs. 8,000 secured by the mortgage of 1904 were not payable because the loan did not fall under the definition of an antecedent debt, the plaintiffs were liable for the amount as the personal debt of their grandfather, for the same reasons that they were liable to pay the sum of Rs. 5,500. As to this argument one of the objections is, as we have already pointed out, that the mortgage was an usufructuary mortgage and there was no personal obligation under which the mortgagor was liable to pay the money. Moreover the doctrine of pious obligation

(1) A. I. R. 1917 P. C. 61=39 All. 437=44 I.A. 126=39 L. C. 280 (P.C.).

(2) A. I. R. 1917 P. C. 76=42 I. C. 791 (P.C.).

(3) A. I. R. 1919 All. 324=50 I. C. 101.

comes into operation only against the sons or in case of their death against the grandsons. The doctrine is based on spiritual considerations apart from the ownership of any property. Even in the case of a Hindu pauper it is the pious duty of his sons to pay off his debts in order to secure him a passage to heaven. The sons of Amar Singh are still alive. The pious obligation to pay the debts of Amar Singh lies upon his sons and not upon his grandsons. Vijnaneswara, commenting on the sloka bearing on the point now under discussion, says as follows :

"If the father not having paid the debt due has died or has gone to a distant country or is overpowered by incurable disease, etc., then the debts contracted by him must be paid by his son or grandson even in the absence of the father's property. Thereon this is the order—on the father's default it is the son, on the son's default it is the grandson (who should pay). Therefore, by a son born giving up his self-interest should the father be carefully released from debt so that he may not go to hell."

We therefore find that there is no pious obligation on the plaintiffs to pay the sum of Rs. 5,500 before recovering the property. It is however conceded before us that a portion of the mortgage money that is Rs. 1,000 was applied towards the payment of a personal debt of Amar Singh owing to a Bank at Meerut. The sum of Rs. 1,000 therefore paid to the bank at Meerut may be considered to come under the definition of an antecedent debt. We therefore hold accordingly. It represents a small portion of the sale consideration. The plaintiffs are therefore bound to pay that amount and they cannot have the sale set aside and recover the property without paying it. We accordingly decree the claim of the plaintiffs for the recovery of the property in suit on the payment of Rs. 1,000 plus interest at 12 per cent per annum from 25th March 1904 to the date of the institution of the suit. After the date of the suit the sum of Rs. 1,000 to carry 6 per cent per annum interest till the date of payment. The money to be paid by the plaintiffs within six months from the date of the decree of this Court, or in default their claim shall stand dismissed. Proportionate costs here and hitherto are allowed to the parties, including fees in this Court on the higher scale.

V.B./R.K. *Appeal partly allowed.*

A. I. R. 1919 Allahabad 417

RICHARDS, C. J. AND RAFIQUE, J.

Chand Rai and others — Plaintiffs—
Appellants.

v.

Bhagwant Rai—Defendant — Respondent.

Second Appeal No. 1244 of 1917, Decided on 13th February 1919, from decision of Addl. Sub-Judge, Ghazipur, D/- 17th August 1917.

Pre-emption—Custom—Entry in Wajibularz of 1880 and 1884—First entry showing that cosharers could sell subject to right of pre-emption—Second entry giving details and showing that property was first to be offered to cosharers — Both entries together held established that cosharer wishing to sell must first offer to other cosharers.

In a suit for pre-emption the plaintiff adduced in evidence an extract from the Wajibularz of 1880 and another extract from the Wajibularz for partition of 1884. The entry in the Wajibularz of 1880 was that all cosharers could sell their property subject to the right of pre-emption. The entry in the Wajibularz of 1884 gave considerable details and showed how the property was first to be offered to cosharers.

Held : that once the existence of a custom of pre-emption in 1880 was proved, the further reference to a right of pre-emption in the Wajibularz of 1884 must be taken as referring to the same right of pre-emption as was recorded less completely in the Wajibularz of 1880 and that both entries taken together established the usual right of pre-emption, that is to say, that a cosharer who wished to sell his property must first offer his share to other cosharers. [P 418 C 1, 2]

S. N. Sen and Janki Prasad—for Appellants.

Nihal Chand—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption. There were three plaintiffs and amongst the defendants was the vendee named in the sale deed of 29th April 1915. There was also another defendant named Bhagwat Rai, to whom a portion of the property was transferred on 25th April 1916. The plaintiffs, in addition to claiming to be entitled to pre-emption challenged the fact of the consideration, alleging that the consideration in the sale deed was not the true consideration. The defendant denied the existence of the custom, stating that the consideration in the sale deed was the real consideration, and the special defence was put in by Bhagwat Rai to the effect that since the institution of the suit a portion of the property was transferred to him and that he was a cosharer and that accordingly the plaintiffs could not obtain a decree against him in any event.

There was a common defence that one of the plaintiffs not being a cosharer either at the time of the original sale or at the date of the institution of the suit, the plaintiffs' claim should be dismissed on this ground. The Court of first instance decreed the plaintiffs' claim as against all the defendants. The lower appellate Court dismissed the suit. The plaintiffs adduced in evidence an extract from the *Wajibularz* of 1880 (or 1881) and an extract from the *Wajibularz* for partition for 1884. The lower appellate Court seems to have been of opinion that the entry in the *Wajibularz* of 1880-1881 only recorded a right co-extensive with the Mahomedan law of pre-emption and inasmuch as the formalities required by Mahomedan law had not been performed the plaintiffs' suit failed. The learned Judge did take into consideration the entry in the *Wajibularz* of 1884, but he considered that document altogether apart from the entry in the *Wajibularz* of 1881. He thought that the entry in the *Wajibularz* of 1884 must be regarded as the record of a contract which he considered not to be binding on the defendants. The entry in the *Wajibularz* of 1881 is that all the cosharers can sell their property subject to the right of pre-emption. The entry in the *Wajibularz* of 1884 gives considerable details and shows how the property must first be offered to other cosharers.

In the case of *Ram Prasad v. Abdul Karim* (1) it was held that the right of pre-emption proved in that case must be taken to be a right to pre-emption according to Mahomedan law. The words used were: "A custom of pre-emption prevails according to the usage of the country." There was no other evidence given in the case as to what the custom was, and it was expressly upon this ground that the judgment of the Court proceeded. We may assume that the words in the *Wajibularz* of 1881 are no more definite than the words used in the case quoted: but in the present case it seems to us that there clearly was evidence as to what the custom was, and this evidence is the extract from the *Wajibularz* of 1884. It seems to us that once you find that a custom of pre-emption did exist in the year 1880, the further reference to a right of pre-emption in the *Wajibularz* of 1884 ought to be taken as referring to the same

right of pre-emption as was recorded less completely no doubt in the *Wajibularz* of 1880. Accordingly in the present case we have evidence which shows that the right of pre-emption was the usual right which we find prevailing in many parts of the country, that is to say, that a cosharer who wishes to sell must first offer his share to other cosharers. Sometimes the custom is a custom which requires the offer to be made to near relations, or persons who are "near" in the shares that they hold. We think under these circumstances that the decision of the Court below was incorrect, and that the Court ought to have held affirming the Court of first instance, that the custom of pre-emption prevailed. We may say in passing that having regard to the fact that the cases were tried together by consent of the parties, the Court was quite wrong in not considering the evidence that was given in the connected case. Even if the learned Judge was technically correct (we do not think he was), he ought certainly to have allowed the document to be brought on to the record. It was evidence which was used apparently without objection in both cases by the trial Court.

The lower appellate Court has found that the transfer to Bhagwat Rai was a genuine transaction, and this is a finding which is binding upon us in second appeal. Even if the transfer to Bhagwat Rai was made for the express purpose of preventing the plaintiffs pre-empting this property, it would be nevertheless a good transfer, provided it was a real transfer and not a pretended transfer. Before finally deciding the appeal we think it necessary to refer certain issues to the lower appellate Court: (1) Was plaintiff 1 a cosharer on 29th April 1915 and at the date of the institution of the present suit? (2) What was the true consideration for the sale of 29th April 1915? (3) What is the value of the property transferred to Bhagwat Rai as compared with the rest of the property in suit? (4) Are the plaintiffs, and if so which of them, nearer cosharers, to Bhagwat Rai either in relationship or space? The parties may adduce further evidence relevant to the last issue. The other issues will be decided upon the evidence already on the record, that is to say, the evidence that was taken in this and the connected Suit No. 131. On return of the findings

(1) [1887] 9 All. 513.

the usual ten days will be allowed for filing objections.

V.B./B.K.

Issues remitted.

A. I. R. 1919 Allahabad 419

RICHARDS, C. J. AND BANERJI, J.

Shiam Narain Tickoo and others —
Plaintiffs—Appellants.

v.

B. B. & C. I. Ry.—Defendant—Respondent.

First Appeal No. 68 of 1918, Decided on 3rd March 1919, from order of Sub-Judge, Agra, D/- 25th April 1918.

Civil P. C. (1908), S. 20—Cause of action—Plaintiff and his wife travelling from Agra to Kuchaman Road—Ticket changed at Bandiqui—In journey hereafter carriage door opened and plaintiff's wife fell and died—Suit against company for damages in Agra Court is not maintainable, cause of action having arisen outside jurisdiction of Agra Court.

Plaintiff and his wife were travelling from Agra to Kuchaman Road by the B. B. and C. I. Ry. and purchased tickets at Agra. They changed trains at Bandiqui and it was alleged that during this part of the journey the carriage door opened out through the neglect of the defendant railway company, either in not locking the door or in not seeing that it was properly fastened and the plaintiff's wife fell out and subsequently died. The plaintiff sued the company for damages in the Agra Court :

Held : (1) that the contract to carry the deceased lady was a contract with herself and there was no privity between the plaintiff and the defendant company : (2) that the suit was based upon tort and upon the provisions of the Fatal Accidents Act and the cause of action having arisen outside the jurisdiction of the Agra Court that Court had no power to try the suit. [P 420 C 2]

Tej Bahadur Sapru—for Appellants.

C. W. Dillon—for Respondent.

Judgment.—This appeal arises out of a suit brought against the B. B. and C. I. Ry. There were four plaintiffs, one adult and three minors. The allegation is that plaintiff 1, his wife and three children (the other three minor plaintiffs) were travelling from Agra to Kuchaman Road and purchased tickets at Agra. The party changed their carriage at Bandiqui station and got into another train. It is alleged that in the course of this part of the journey the carriage door opened out through the neglect of the defendant railway company, either in not locking the door or in not seeing that it was properly fastened and plaintiff's wife fell out and subsequently died. One of his minor girls Ram Dulari, plaintiff 3, also fell out and was injured. Rs. 25,000 were claimed by the family as damages

for the death of the wife of plaintiff 1 and Rs. 5,000 were claimed by Ram Dulari and Sham Dulari for injuries caused to them. Various pleas were raised by the defendant company. They contended that the causes of action in respect of the death of the wife and the injuries to the daughters could not be joined. They also pleaded that the Agra Court had no jurisdiction as the cause of action did not arise in that district. There were of course also pleas denying neglect and liability. The Court below held that it had no jurisdiction to entertain the suit and directed the plaint to be returned for presentation in the proper Court. The plaintiffs have appealed.

It is quite clear that *prima facie* a company should be sued at its principal place of business which in this case is at Bombay. If however the plaintiffs could show that the cause of action wholly or in part arose at Agra, then the suit could be instituted at that place. The contention on behalf of the plaintiffs is that the buying of a ticket by each member of the family was a contract between the individual and the railway company to carry that individual "safely" from Agra to the place of destination as set forth in the ticket and that the suit accordingly being based upon contract, the cause of action either wholly or in part arose at Agra. On the other hand the defendant company contend that the alleged neglect about the carriage door was the "cause of action" and this occurred, if at all, outside the jurisdiction of the Agra Court.

In support of the contention of the plaintiffs certain English cases have been cited and amongst them the cases of *Austin v. G. W. Ry Co.* (1) and *Foulkes v. Metropolitan District Railway Company* (2). In the earlier of these two cases a mother sued for damages on the allegation that she, accompanied by her infant child, who was under three years of age, was travelling on the defendant company's railway when the accident happened whereby the child was injured. The jury found in favour of the plaintiff. A question had arisen as to whether or not the child was more than three years old. If it was under three years the mother was entitled to take it without

(1) [1867] 2 Q. B. 442.

(2) [1879] 4 C. P. D. 267.

the payment of any fare. For the purposes of argument it was assumed that the child was under three years of age, and on this assumption it was held that the verdict of the jury awarding damages could not be disturbed. Three of the Judges state that the right was founded on the contract which arose when the lady purchased her ticket and that the contract was to carry "safely." Blackburn, J., put the obligation on a different ground, namely the duty which the company owed, quite irrespective of the contract. In the case of *E. I. Ry. Co. v. Kalidas Mukerji* (3), the very case which we have just mentioned was referred to. In the case before their Lordships of the Privy Council the plaintiff's son had taken a ticket at Howrah. In the course of the journey another passenger entered the carriage having with him a lot of fireworks. The fireworks exploded and the plaintiff's son was injured and subsequently died of the injuries, whereupon the plaintiff instituted the suit. The Indian Courts held that the defendant company was liable because there was a duty independently of any implied contract to carry the passenger "safely." It was argued before their Lordships of the Privy Council that the extent of the obligation of the railway company is to carry "safely." In short it was said that they are common carriers of passengers. Their Lordships held that this was not the law. Their Lordships refer to the case of *Austin v. G. W. Ry. Co.* (1) and say at p. 410 of the report:

"In the one case it was a child under three years of age between whom and the railway company of course there was no contract, and the other is a case of the same character. It is important perhaps to observe what runs through the judgments and to observe that Mr. Asquith naturally enough used the same phrase yesterday in his argument as enforcing the necessity of the railway company discharging themselves by inconceivable evidence by saying that their contract was to carry safely. Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that in their Lordships' judgment there is no such obligation on the part of the railway company."

It must be admitted at once that the facts in the present case and the facts of the case to which we have just now referred are by no means identical. In the case before us the allegation is an allegation of neglect connected with the keep-

ing of the door shut. In the case before their Lordships of the Privy Council the allegation was neglect in allowing a passenger to bring fireworks into the compartment. We think however that the case has very distinct bearing upon the question as to whether the liability of the company in the present case is or is not founded upon contract. Even however if we assume that a person who purchases a ticket can sue the company "ex contractu" for injuries suffered during the course of the journey, it is important to point out the foundation of the main claim put forward in this suit, that is the claim for damages consequent upon the death of the wife of plaintiff 1, is under the Fatal Accidents Act of 1855. The preamble of that Act is as follows:

"Whereas no action or suit is now maintainable in any Court against a person who by his wrongful act, neglect, or default, may have caused the death of another person and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damage for the injury so caused by him"

The contract to carry the deceased lady was a contract to carry herself. There was no privity between the plaintiffs and the company and no contract entered into by the company with the plaintiffs to carry this lady, and a suit so far as relates to her death is a suit based upon tort and on the provisions of the Fatal Accidents Act of 1855, and cannot we think be based on contract. After full consideration we have come to the conclusion that the decision of the Court below was correct. We accordingly dismiss the appeal with costs, including in this court fees on the higher scale. The plaint will, of course, be returned for presentation to the proper Court as directed by the Court below.

V.B./R.K.

Appeal dismissed.

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PIGGOTT AND WALSH, JJ.

Mt. Fatima Bibi and others — Defendants—Appellants.

v.

Ram Narain Sahu and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 244 of 1915 decided on 6th April 1918 from decision of Second Sub-Judge, Jaunpur, D/- 30th March 1915.

Civil P.C. (1908), O. 41, R. 22—It is within discretion of appellate Court to permit res-

(3) [1901] 28 Cal. 401=28 I. A. 144=8 Sar. 33 (P. O.).

pondent to prefer cross-objections against co-respondents.

Plaintiffs instituted a suit upon a mortgage-deed, purporting to have been executed by four males and two ladies and to convey an 8-anna share out of 16 annas in 3 villages and certain house property and grove, the share of the ladies in the property being $\frac{2}{5}$ ths of the whole and of the male executants $\frac{3}{5}$ ths of the whole; the suit was for realization of the mortgage-debt from an 8-anna share of the defendants in a single village and also from the house and the grove. The trial Court, finding that the execution of the deed by the ladies was not proved, gave a decree against the male executants for the sale of an 8-anna share on the ground that, after deducting the share of the ladies, they owned between them more than an 8-anna share out of the entire 16 annas. The defendants against whom the decree was passed appealed, the plaintiff and the ladies being made respondents. The plaintiffs filed a petition of cross-objections, contending that execution was proved against the ladies. The defendants-appellants objected that the plaintiff was not entitled to challenge the order of the Court below dismissing the suit against the ladies, by way of a petition of cross-objections:

Held, that it was open to the plaintiff, as respondent to the appeal, to support the decree of the Court below, in so far as that decree ordered the sale of a share of 8-annas, upon a ground that had been decided against him by the trial Court, namely, upon the allegation that the document in suit had been executed by the ladies, and that as soon as an appeal was filed on the plea that in any event only $\frac{3}{5}$ ths out of an 8-anna share should be ordered to be sold, the plaintiff had a ground for asserting his original claim, and it was within the competence and discretion of the High Court to permit the petition of cross-objections to be heard, even as against those defendants to the suit who were arrayed as respondents to the appeal.

[P 422 C 2]

Tej Bahadur Sapru and S. M. Sulaiman—for Appellants.

B. E. O'Connor and Gokul Prasad—for Respondents.

Piggott, J.—This is a suit on a mortgage of 17th September 1900. The executants of this deed were six persons. Jamil Ullah and Jalil Ullah, the two sons, and Mt. Khatun Bibi, the surviving widow of one Khalil Ullah deceased, were the first three. The other three executants, Johra Bibi, Mohammad Shibli and Muhammad Makki, were members of the same family, connected more or less distantly according to a pedigree which is to be found at page 2 of the printed record. The only point I desire to make about these three executants at present is that the pedigree does not show that they could have inherited any property from the deceased Khalil Ullah so as to be liable for payment of any portion of that gentleman's

debts. The suit as brought is against the executant Jamil Ullah in person and the heirs of the remaining five executants, all of whom are since deceased. The Court below has found execution proved as against the four male executants and not proved as against the two ladies, Khatun Bibi and Johra Bibi. The mortgaged property as specified in the deed in suit consists of shares in three villages and certain house property and a grove, but the present suit is for realization of the entire mortgage-debt from an 8-anna share of the judgment-debtors in a single village, the name of which is variously written as Gowai or Gowaipur, and also from the dwelling house and the grove. We have no information before us as to the respective shares of the various executants of the deed in the dwelling house or in the grove; but as regards the principal item involved in the plaintiffs' claim, namely, the share in village Gowaipur, an extract from the register of proprietary rights is printed at page 60R. This shows that in the village in question the six executants of the deed owned in the year 1900 an entire Mahal of 16-annas and that they owned the same in certain specified shares. For our purposes it is sufficient to note that the shares of the two ladies came to $\frac{2}{5}$ ths of the whole and the shares of the four male executants to $\frac{3}{5}$ ths of the whole. The deed in suit purports to mortgage an 8-anna share out of the whole 16 annas, the said mortgaged share being the property of all the executants, but without any further specification. Now the learned Subordinate Judge, while finding it not proved that the two ladies, Mt. Khatun Bibi and Johra Bibi, had executed the deed in suit, has nevertheless given a decree for the sale of an 8-anna share, on the ground that the male executants of the deed in suit did own between them more than an 8-anna share out of the entire 16 annas, even after excluding the shares owned by the two ladies.

We have before us an appeal by those defendants against whom the suit was decreed, and a petition of cross-objections under Order 41, rule 22, Civil P. C., has been filed by the plaintiffs. The appeal raises in the main three points:—

Firstly, it is contended that execution of the deed in suit is not proved as

against any of the executants other than Jamil Ullah.

Secondly, it is contended that, even if execution be proved against any or all of the other executants, there has been no valid registration of the document as against any of the executants other than Jamil Ullah.

Thirdly, it is contended that, in any event, the decree should have been for the sale of 3/5ths of an 8-anna share and not an entire 8-anna share.

The remaining pleas in the memorandum of appeal are either summed up in the three contentions above stated or have not been seriously pressed.

In the memorandum of cross-objections the plaintiffs contend that execution was proved as against the two ladies Khatun Bibi and Johra Bibi and that effect should be given to this contention, if allowed, in any decree which this Court may pass.

It will be convenient to state at once that this petition of cross-objections was met at the outset by those defendants who represent the estate of Khatun Bibi and Johra Bibi, by a plea that the plaintiffs were not entitled to challenge the order of the Court below dismissing the suit as against the representatives of these ladies by way of a petition of cross-objections. The point is that the representatives of these ladies are arrayed along with the plaintiffs as respondents to this appeal. They were content to accept the decree of the Court below as passed and have not themselves appealed against it. In support of this contention reliance is placed upon a decision of this Court in *Kallu v. Manni* (1), in which the principle contended for is laid down in broad terms. As a matter of fact the position has since been reconsidered by this Court in *Abdul Ghani v. Muhammad Fasih* (2). We have been referred also to decisions of other High Courts to be found in *Bishun Churn Roy Chowdhry v. Jagendra Nath Roy* (3), *Shabiuddin v. Deemoorat Koer* (4), *Jadunandan Prosad Singha v. Koer Kallyan Singh* (5), *Nursej Virji v. Al-*

fred H. Harrison (6) and *Munisami Mudaly v. Abbu Reddy* (7). It may be noted at once that it was in any event open to the plaintiffs, as respondents to the appeal, to support the decree of the Court below, in so far as that decree ordered the sale of a share of eight annas, upon a ground which had been decided against them by the trial Court, namely, upon the allegation that the document in suit had, contrary to the finding of the Court below, been duly executed by Khatun Bibi and Johra Bibi. It was impossible therefore to close the mouth of the learned advocate for the respondents or to refuse to re-consider this question of execution by the two ladies. As a matter of fact, under the peculiar circumstances of this case, it seems clear that the plaintiffs could not be blamed for acquiescing in the decree of the trial Court so long as that decree entitled them to bring to sale a full eight-annas share; but they had ground for re-asserting their original claim as soon as an appeal was filed on the plea that in any event only 3/5ths out of an eight annas share should be ordered to be sold. Under the circumstances we think it was within the competence and discretion of this Court to permit the petition of cross-objections to be heard, even as against those original defendants to the suit who were arrayed as respondents to this appeal. If we had found the contentions urged in the petition of cross-objections to be well-founded in fact, we should have been prepared to give effect to them in our decision.

It is as well to take up at once this question of the execution of the deed in suit by Khatun Bibi and Johra Bibi. They were illiterate and pardanashin ladies and they do not purport to have executed the document in suit by signing it or by making their mark, or by means of their thumb-impressions. On behalf of Mt. Johra Bibi her name as executant of this deed purports to have been written by her son Naim Ullah; on behalf of Mt. Khatun Bibi, by her son Bashir Ullah. The question in issue is simply whether these two young men had authority to execute the deed on behalf of their respective mothers. Naim Ullah is dead,

(1) [1900] 23 All. 93=(1900) A. W. N. 212.

(2) [1905] 28 All. 95=2 A. L. J. 667=(1905) A. W. N. 200.

(3) [1901] 26 Cal. 114.

(4) [1905] 30 Cal. 655.

(5) [1912] 13 I. C. 653=16 C. W. N. 612=15 C. L. J. 61.

(6) [1913] 37 Bom. 511=21 I. C. 7=15 Bom. L. R. 781.

(7) [1915] 38 Mad. 705=27 I. C. 323=27 M. L. J. 740=(1915) M. W. N. 45.

but Bashir Ullah was put into the witness-box on behalf of the defendants.

He admitted having written his mother's name as executant of the deed in suit, but refused to admit that he had her authority for so doing. He professed to have acted on assurances given him by Jamil Ullah, whom he regarded as the head of the family. Jamil Ullah, on the other hand, was put into the witness-box by the plaintiffs. He deposed that the document in suit was duly executed in his presence and that Naim Ullah and Bashir Ullah wrote the names of their respective mothers as executants "with the permission" of the said ladies. He was very reluctant to commit himself to any definite assertion as to the manner in which that permission had been obtained, but so far as it goes, the effect of his statement is as given above. Further the plaintiff Behari Lal went into the witness-box and called 2 out of the 3 surviving marginal witnesses, the names of the witnesses called being Sitaram and Debi Prasad. We have had to consider all this evidence carefully in connexion with the various admitted facts of the case and the inferences derivable from such facts. It is clear that the mortgagees in this case accepted as their security a document the validity of which, as regards the shares of the lady executants, depended on their being able to prove the authority of Naim Ullah and Bashir Ullah to sign for their respective mothers. Moreover the document was registered, as we shall have presently to consider, upon an admission of execution made by Jamil Ullah in his own behalf and on behalf of all the other executants. We therefore lack, in this case the sort of direct safeguard of the interests of a pardanashin lady which is ordinarily provided by the procedure laid down in the Registration Act. If the plaintiffs in fact suffer any appreciable loss by reason of this defect in the nature of the security accepted by them and in the procedure adopted at registration, they are after all a good deal to blame, because they could certainly have insisted on the thumb impressions of the two ladies, or at least their marks, being taken at the time of execution, and they could also have insisted on the registration of the document being effected only after direct admission of execution had been obtained from the ladies themselves.

We are concerned simply with the question whether the evidence produced is sufficient to prove execution affirmatively as against the representatives of the two ladies. The evidence of Jamil Ullah has been attacked on both sides and cannot be relied on by either. Having committed himself before the Registration Officer to an admission of execution on behalf of the two ladies, he could scarcely say less than he has done in favour of the plaintiffs without running the risk of a criminal prosecution; on the other hand, he does seem to have been fairly careful to say nothing more in favour of the plaintiffs than he could help. So far as his own interests are concerned, he stands to gain rather than to lose by a decision in favour of the plaintiffs on the question of execution by the two pardanashin ladies. His evidence can best be dealt with by being put on one side altogether.

We then have left the depositions of the plaintiff Behari Lal and the two attesting witnesses. The learned Judge of the Court below has come to the conclusion that this evidence does not satisfactorily prove that the two ladies were actually present, at the time of execution, in a room adjoining that in which the document was executed by the male executants, or that they were consulted at the time about the question of execution or gave the alleged authorization to their respective sons to sign for them. There are undoubtedly serious discrepancies in the evidence and difficulties in the way of accepting it as it stands. There are passages in the deposition of the plaintiff Behari Lal which certainly suggest the inference that he was personally of opinion that Naim Ullah and Bashir Ullah had authority to execute such a document as the mortgage in suit on behalf of their respective mothers under the arms of the power of attorney on the strength of which the registration was subsequently effected. If this was his impression it is an erroneous one, for the document in question does not confer any such general authority on the two young men. At the same time the existence of such an impression in the plaintiff's mind might well account for his having accepted the signatures of the two young men as sufficient, without any of the elaborate precautions which at the trial he endeavoured to prove that he had in fact

taken. There are undoubtedly circumstances in the case from which a general inference might be drawn in favour of the statement that the two ladies in question must have known of this mortgage transaction and must have given at least a tacit permission to their sons to act on their behalf. At the same time I feel very strongly that the direct evidence by which the plaintiff has sought to prove an authorization given verbally at the time of execution, after the deed had been read over and explained to the ladies, is quite unreliable. It has been rejected by the Court which heard it and I certainly do not feel prepared to reverse the finding at which the trial Court has arrived on this point. I think therefore that this finding must stand and that the execution of this deed by Khatun Bibi and Johra Bibi is not satisfactorily proved. It is not necessary therefore so far as these ladies are concerned, to go into the question whether there was a valid registration on their behalf.

The points raised in the memorandum of appeal may be more briefly disposed of. The first question is, whether execution is proved as against the male executants other than Jamil Ullah. Here I feel able to concur without hesitation in the conclusion arrived at by the learned Subordinate Judge. The evidence given by Jamil Ullah himself, by the plaintiff Behari Lal and by the two marginal witnesses does prove that the parties concerned in this transaction came together in the male apartments of the residential house of the mortgagors, that a draft deed was produced and the mortgage deed in suit faired out accordingly and that the male executants did sign the document then and there in the presence of the attesting witnesses. The plea therefore fails. It is worth noticing further in this connexion that the bulk of the consideration consisted of a cash payment made to Jamil Ullah and of antecedent debts due from Khalil Ullah, while the property in suit had come to the lady executants from their own family and not from Khalil Ullah at all.

As regards registration, it has already been remarked that the document was presented for registration by Jamil Ullah alone. This he had a right to do, so that there was no invalidity about the presentation of the document. The only question is, whether Jamil Ullah was an

authorized agent for the purpose of admitting execution on behalf of the male executants, within the meaning of S. 34, Registration Act. There has been a great deal of controversy about the power-of-attorney under which Jamil Ullah purported to act. The original of this document has not been produced. The learned Subordinate Judge has admitted secondary evidence on the ground that the original is somewhere in the possession or control of one or other of the defendants and that the plaintiffs seemed to have made all reasonable efforts to get the original before the Court. He has pointed out that there was one oversight on the part of the plaintiffs in the matter of service of notice on one possible person in whose possession the original of this document might conceivably have been; but on an examination of the record as a whole I can see no reason whatever for holding that the Court below was not well within its discretion in admitting secondary evidence. The secondary evidence is of the most satisfactory character; a certified copy has been obtained from the registration department. There is a great deal of evidence tending to show that this document was, as a matter of fact, acted upon as a genuine and valid document by all the parties concerned in it for a period of years. The execution of the power-of-attorney was certified by the Registering Officer to have been made in his presence as required by S. 33, Registration Act. He seems, as a matter of fact, to have taken the trouble to get it re-executed at the time of his visit to the house in which the lady executants were residing, even though it had previously been executed by all the persons concerned; on the whole, as regards the male executants of the mortgage deed in suit at any rate. I can see no good reason for holding that Jamil Ullah was not their authorized agent under this power-of-attorney to admit execution on their behalf. There has therefore been sufficient proof of execution and of valid registration as against all the male executants.

The only point on which the appeal must succeed is the third point. The reasons given by the learned Subordinate Judge for ordering the sale of an entire 8-annas share, after his finding against the validity of the execution of the mortgage deed by Khatun Bibi and Johra Bibi,

will not bear examination. He has dragged in the provisions of a section of the Transfer of Property Act which are obviously inapplicable to the state of facts before us. Moreover there is in the pleadings on this record something quite decisive against the plaintiffs. It has been pointed out that the executants of the deed in suit owned the entire 16 annas of this particular mahal in village Gowai-pur. Eight annas were mortgaged to the plaintiffs by the deed in suit. The remaining 8-annas, according to the plaint itself, had since been mortgaged to certain other persons who were impleaded as defendants 24 to 27 and 28. With regard to these defendants the plaintiffs themselves contended that the 8-annas share in respect of which the present suit was brought must be treated as wholly distinct from the 8-annas share mortgaged to these other defendants. We have been told in the course of argument that, as a matter of fact, this point is *res judicata* as between the plaintiffs and the other mortgagees in connexion with a certain other litigation.

There has been some negligence on the part of the defendants-appellants in laying proper materials in support of this contention before this Court, but under the circumstances it is not necessary to go further into the point. On the mortgage deed in suit, read in connexion with the entries in the register of proprietors, the fair inference would be that each of the executants of the deed in suit had mortgaged one-half of his share in the entire mahal of 16 annas; and this was the contention which the plaintiffs themselves in para. 4 of their plaint asked the Court to accept. It follows, therefore that, whatever additional shares the male executants of the mortgage-deed may have possessed in the other half of the mahal, that is to say, in the 8 anna share mortgaged to defendants 24 to 27, those shares are not subject to the plaintiff's claim in the present suit. The plaintiffs are only entitled to realize their mortgage debt against the total of the shares of the male executants in the 8-anna share covered by the deed in suit, that is to say, in $\frac{3}{5}$ ths out of the said 8-annas. The result is that this appeal should succeed to this extent only, that the order for sale be not for the sale of an 8-anna share but for the sale of $\frac{3}{5}$ ths out of the share of 8-annas

claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, including fees on the higher scale, in proportion to failure and success. The cross objections are dismissed with costs, including fees on the higher scale.

Walsh, J.—I agree in the order proposed. The case with regard to the execution of the deed by the two ladies is undoubtedly a difficult one. The evidence of Bashir Ullah is evidence upon which no Court ought to rely except as regards admissions and statements made by him against himself. According to his own statement on oath repeated more than once, he made a perfectly shameless confession of having forged his mother's name. Not merely having forged his mother's name but having done so at the request of what he calls his elder brother, in fact his cousin, with the intention of defrauding the creditor. The lower Court has made no reference to his evidence in its judgment. If I had been trying the case I should, at its conclusion, have directed his prosecution for an offence under S. 463, and it seems to me a case which ought not to be left where it is. Offences of this kind shamelessly proclaimed in Courts of law eat at the foundation of commercial credit in any community, and I see no reason why, as long as Courts of justice pass them by in silence, they should not flourish and abound. The direct evidence with regard to the execution is no doubt exaggerated, conflicting and unsatisfactory but men have been sent to transportation on evidence not less contradictory, and it is evidence which, after all, points in the same direction, that is to say, there is no evidence worthy of the name to negative it. The position of the family, the nature of the transaction and the surrounding circumstances make it *prima facie* not improbable that the ladies consented to and authorized this transaction. The Court below however has found otherwise. Although I am not sure whether if trying the case, I should have come to the same conclusion, I find myself unable to say that the Court below was necessarily wrong. On the other points I agree with my brother.

By the Court.—The order of the Court is that this appeal should succeed to this extent only that the order for sale

be not for the sale of an 8-anna share but for the sale of 3/5ths out of the share of 8-annas claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, including fees on the higher scale, in proportion to failure and success. The cross-objections are dismissed with costs, including in this Court fees on the higher scale.

V.B./R.K.

Appeal accepted.

A. I. R. 1919 Allahabad 426 (1)

RICHARDS, C. J. AND BANERJI, J.

Chunni Lal—Plaintiff—Appellant.

v.

Biri Singh and others—Defendants — Respondents.

Second Appeal No. 1354 of 1916, Decided on 8th November 1918, from decree of Dist. Judge, Mainpuri.

Agra Tenancy Act (2 of 1901), S. 20 (2) — Expropriatory holding cannot be sold in execution of money decree — Suit by purchaser to recover possession is not maintainable

In execution of a simple money decree the plaintiff brought to sale certain plots of land forming part of the expropriatory holding of the defendant and purchased them himself. He obtained formal possession of the plots and subsequently brought a suit to recover actual possession:

Held: (1) that having regard to the provisions of S. 20 (2) the plots could not be sold in execution of a decree and the plaintiff was therefore not entitled to recover possession of them; (2) that the plaintiff was not entitled to recover possession of the trees standing upon the plots apart from the land. [P 426 C 1, 2]

Kailas Nath Katju and Iqbal Ahmad—for Appellant.

Gulzari Lal for Girdhari Lal Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiff claimed possession of certain plots of land. It appears that more than 12 years before the institution of the suit, the plaintiff or his predecessors-in-title obtained a simple money decree against the defendants or their predecessors-in-title. In execution of this decree the plots of land were put up for sale and purchased by the decree-holder. It has been found that the plots of land formed portion of the expropriatory holding of the judgment-debtor and both the Courts below have held, and we agree with them, that having regard to the provisions of the Tenancy Act the interest of the expropriatory tenant could not be sold in

execution of the decree. It is then said that the plaintiff is at least entitled to the trees. From the description of the plots of land or some of them it would appear that trees were growing on the plots of land, but will be clearly seen from the sale certificate and from the whole nature of the present suit that the plaintiff was claiming not the trees but the plots. (Of course he hoped that the trees would pass to him with the land). The plaintiff alleged that he had been in possession of the trees and gathering and receiving the fruits. An issue was referred on this point and the Court below has held that the plaintiff was not in possession even of the trees.

It is admitted that the dakhnama giving the plaintiff formal possession of the subject-matter (if any) of his purchase was within 12 years of the institution of the suit and it is now contended that the plaintiff is at least entitled to possession of the trees. In support of this contention the provisions of the *wajibularz* are referred to. This, no doubt, records the tenants' right to sell the trees growing on the holdings planted by themselves or of spontaneous growth but we do not think that the *wajibularz* is sufficient to prove that the tenants, had the right of selling trees as growing trees and to hold the land for perhaps 50 years or more. In addition to this, as we have already pointed out, we think that what was really sold to the plaintiff was the plot of land and that it was the land he really claimed in the present suit. Not only is there the statutory provision to prevent his being successful in the present suit, but it would appear that he slept upon such weak rights as he had for more than 12 years from the date of his purchase and almost 12 years from the date of receiving formal possession. We think that the view taken by the Court below was correct and should be affirmed. We accordingly dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 426 (2)

BANERJI AND PIGGOTT, JJ.

Benaik Rao and others—Appellants.

v.

Putain Singh—Respondent.

First Appeal No. 16 of 1919, Decided on 29th July 1919.

Civil P. C. (5 of 1908), O. 9, R. 13 and O. 43, R. 1 (a)—Order setting aside *ex parte* decree is not appealable.

An order granting an application under O. 9, R. 13, is not appealable. [P 427 C 1]

M. L. Agarwala—for Appellants.

S. P. Ghose—for Respondent.

Judgment.—A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies. The order from which the appeal has been presented purports to be an order under O. 9, R. 13, Civil P. C. The application on which that order was passed was an application under the order and rule mentioned above. From an order granting such an application no appeal lies under O. 43, R. 1, Civil P. C. We therefore dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 427

PIGGOTT AND WALSH, JJ.

Kalka Prasad—Decree-holder — Appellant.

v.

Raj Rani and others—Judgment-debtors—Respondents.

Execution Second Appeal No. 261 of 1917, Decided on 11th December 1918, from a decree of Dist. Judge, Jhansi.

(a) **Bundelkhand Alienation of Land Act (2 of 1903), S. 4—Hindu Ghosis of Jalaun District are members of agricultural tribe.**

Hindu Ghosis of Jalaun District are a sub-caste of Ahirs and are therefore members of an agricultural tribe within the meaning of S. 4, Bundelkhand Alienation of Land Act.

[P 429 C 1]

(b) **Bundelkhand Alienation of Land Act (2 of 1903), S. 6—Suit on mortgage executed by members of agricultural tribe—Preliminary decree for sale—Court has power to refuse to make decree absolute.**

A member of an agricultural tribe executed a mortgage of certain land in favour of a non-agriculturist. The latter brought a suit on foot of the mortgage and obtained a preliminary decree for sale. On application made for a final decree the Court refused to pass it on the ground that the mortgage was in contravention of the provisions of S. 6, Bundelkhand Alienation of Land Act and sent the case to the Collector.

Held: that the procedure adopted by the Court was perfectly legal. [P 429 C 1]

(c) **Bundelkhand Alienation of Land Act (2 of 1903), S. 6 — Provisions of Act are mandatory upon civil Courts.**

The entire provisions of the Bundelkhand Alienation of Land Act are mandatory upon the civil Courts and the Courts are bound to enforce them independently of any pleading raised by the defendant in a particular suit. [P 430 C 1]

(d) **Precedent—Division of Board of Revenue—Though not binding still should be respected.**

Per Walsh, J.—A decision of the Board of Revenue on a matter arising under the provisions of the Bundelkhand Alienation of Land Act, although not binding upon the parties to a civil suit, is a matter which any civil Court is bound to examine very closely. Any civil Court, although not bound, ought to follow such a decision of the Board in a matter peculiarly within its knowledge and jurisdiction, unless there is some overriding reason to the contrary.

[P 430 C 1]

Surendra Nath Sen—for Appellant.

J. N. Mukerjee—for Respondents.

Piggott, J.—The questions raised by this appeal concern the operation of certain provisions of an Act of the Local Legislature, the Bundelkhand Alienation of Land Act (2 of 1903). The suit was on a mortgage of the year 1909 and the defendants were described in the plaint as being by caste Ghosis, which they admittedly are. The mortgage was a simple mortgage providing for the sale of the mortgaged property in the event of non-payment; that is to say, it was admittedly not a form of simple mortgage permitted to a member of an agricultural tribe in the Jalaun district by S. 6, Cl. (b) of the Act above referred to. The defendants never pleaded that they were members of an agricultural tribe and the Court proceeded to pass, on 9th October 1915, a preliminary decree for sale of the mortgaged property. On 14th April 1916, the plaintiff decree-holder applied to the Court for the passing of a final decree for sale. The Court recorded an order to the effect that, upon inquiries made since the passing of the preliminary decree, it had come to entertain doubts whether the defendants were not members of an agricultural tribe subject to the provisions of the Bundelkhand Alienation of Land Act. It went on to hold judicially that the defendants being Ghosis professing the Hindu religion, were members of an agricultural tribe as aforesaid and that consequently no decree for sale could be passed in respect of the land in suit. It held that in spite of the fact that a preliminary decree for sale had already been passed, the only order in conformity with law which could be passed, by reason of the provisions of S. 9, Cl. 3, Alienation of Land Act, was an order referring the case to the Collector with a view to his dealing with the matter in the manner provided

by the Act. There was an appeal against this decision but it has been affirmed by the District Judge.

The second appeal before us raises a number of questions which require to be separately considered. The first and most essential question to be determined is whether the defendants are or are not members of an agricultural tribe within the meaning of Local Act 2 of 1903. By S. 4 of that Act it is provided that the Local Government shall by notification in the Gazette determine what bodies of persons, in any district or sub-division of a district subject to the operation of the said Act, are to be deemed agricultural tribes for the purposes of the Act. The Local Government has published a notification dealing with the Jalaun District in which the parties to this suit reside. In that notification persons who are by caste Ahirs are declared to be members of an agricultural tribe as aforesaid. The Courts below have held that Ghosis professing the Hindu religion are a sub-caste of Ahirs and are therefore included in the notification in question. By consulting standard books of reference on this question the following facts are ascertainable. The word "Ghosis," strictly speaking, seems to connote an occupation rather than the name of a caste. The meaning of the word is "shouter" and it is applied to herdsmen with reference to the vociferations resorted to by them in the herding of their cattle on the pasture lands.

The majority of persons calling themselves Ghosis are converts to the Mahomedan religion, or descendants of such converts, and there is reason to believe that they consist mainly, if not entirely, of the descendants of families once belonging to the Ahir caste and still following their hereditary profession of herdsmen. A certain number of Ghosis however still profess the Hindu religion. They do not appear to be very numerous in the Jalaun district and the question whether they are to be treated as a distinct caste of Hindu Ghosis, or as a sub division of the Ahir caste, has had to be considered by the authorities on various occasions, apart from the operation of the Alienation of Land Act. We find that in the census returns prepared under the orders of the Local Government both at the census of 1901, immediately before the

passing of Local Act 2 of 1903, and also at the next census of the year 1911, the Hindu Ghosis in Jalaun, as well as in other districts of Bundelkhand, were classified as a sub-caste of Ahirs. It has been suggested in argument that a statement of this sort in a census publication is not relevant to the question now before the Court for trial. What we have to determine is the meaning of the word "Ahir" in a certain Government Notification. We have to decide, with reference to this word, as it appears in this notification, whether it does or does not include the Hindu Ghosis of the Jalaun district. As bearing upon the meaning of the word in the notification it seems to be a relevant fact that in the returns prepared at two consecutive census enumerations of the population, under the orders of the same Government, the Hindu Ghosis were enumerated and classified as a sub-caste of Ahirs.

It seems a reasonable argument that when the Local Government used the word Ahirs in this notification, it intended to include all sub-castes or subdivisions of the Ahir caste, referred to in the recent census enumeration prepared under its own orders. That the same classification was maintained at the census of 1911 seems to be also a relevant fact as showing that there has been no change in what may be called the official attitude on the question. It is further to be noticed that the question which we have now before us has had to be considered by another authority competent to pronounce a judicial opinion on the point, namely by the Board of Revenue of these provinces. We are entitled to take judicial notice of the constitution of the Government of these provinces, including such facts as the judicial and executive powers exercised by the Board of Revenue. The Bundelkhand Alienation of Land Act was passed in close connexion with a kindred statute, namely the Bundelkhand Encumbered Estates Act, which was Local Act 1 of 1903. The administration of this Act was left in a very peculiar manner to the Board of Revenue; and we are fairly entitled to conclude that in such a matter as the preparation of the list of agricultural tribes the opinion of the Local Government would be based largely upon advice received from the Board of Revenue. From every point of view therefore it

seems to be a relevant fact in the case that the Board of Revenue, having had to consider the very question which is now before us has come to the conclusion that the Hindu Ghosis were intended to be included under the designation of Ahirs, as a sub-caste of the Ahir caste, in the notification published under S. 4, Alienation of Land Act (2 of 1903). On these grounds therefore I would hold that the decision of the Courts below was right and that these defendants are in fact members of an agricultural tribe, namely, the Ghosi subdivision of the Ahir caste, in the Jalaun district.

The next point taken is that the provisions of S. 6 of Local Act 2 of 1903 do not affect this case, or in the alternative that the contention upon which the case has been decided by the Courts below could not be raised after the passing of the preliminary decree for sale. The policy of the Alienation Act in Bundelkhand was to afford statutory protection to certain classes of land-holders as regards the alienation of their proprietary rights in land, while at the same time restricting their right to make such alienations. S. 6 deals with the question of the mortgages which a landed proprietor who is a member of an agricultural tribe may lawfully contract. He has an unlimited power of mortgage in favour of members of the same agricultural tribe as himself residing within the same district, but otherwise his right of dealing with his own property by way of mortgage is subject to severe restrictions. We are concerned in this case with Cl. (b) of the section. This provides, in effect, that a member of an agricultural tribe subject to the provisions of this Act cannot lawfully enter into a contract of mortgage by which he authorizes the mortgagee, in the event of non-payment, to bring to sale the mortgaged property. The utmost he can do is to covenant that, in the event of his failure to pay the stipulated sum on due date, the mortgagee shall be entitled to obtain through the intervention of the Collector possession over, and enjoyment of the mortgaged property for such term of years as the Collector shall consider reasonable under the circumstances. This is on the one hand a restriction on the proprietary rights of the intending mortgagor and would operate no doubt as a restriction on his credit. On the other

hand, it is a protection of those proprietary rights by preventing their being brought to sale in execution of a decree passed upon a simple mortgage in the ordinary form. This object is further carried out by the provisions of Ss. 9 and 16 of the same Act.

Under Cl. 3, S. 9, it is provided that in a suit like the present, if the proprietor who is a member of an agricultural tribe has, in contravention of the provisions of S. 6, entered into a contract of simple mortgage in the ordinary form, that is to say, providing for sale of the mortgaged property in default of payment, the Court shall not pass a decree for sale, but shall on the contrary give the mortgagee the only relief to which he would have been entitled if the mortgagor had not broken the law. It must refer the case to the Collector, in order that he may deal with it by giving the mortgagee possession over the mortgaged property for such term of years as he considers just. Under S. 16 the legislature has further provided a general prohibition against the bringing to sale of land belonging to a member of an agricultural tribe in execution of any decree or order of any civil Court made after the commencement of the Act. With reference to this latter section it has been contended before us that the learned District Judge was not justified in referring to it, inasmuch as the question of the actual sale of the mortgaged property in this case could only arise upon an application for execution of a decree absolute for sale. It seems to me that the learned District Judge was entitled to the provisions of S. 16 as enforcing the propriety of the order passed by the first Court and upheld by him on appeal. A reference to S. 16 shows that, even if the trial Court in this case had gone on to pass a decree absolute for sale, that decree would have been unenforceable in execution, once the Court was satisfied that the judgment-debtor was a member of an agricultural tribe. This is a good reason for not passing such a decree and for giving the plaintiff mortgagee in lieu thereof the best relief obtainable by him under the Statute.

The contention that the parties to the litigation are bound by the terms of the preliminary decree and that the question of the position of the defendants as members of an agricultural tribe was not

one which should have been raised after the passing of the preliminary decree, does not impress me, because I look upon the entire provisions of the Bundelkhand Alienation of Land Act as mandatory upon the civil Courts of the district. If a proprietor who was a member of an agricultural tribe were permitted to evade those provisions, by not claiming the benefit of his status as a member of such tribe, it would make those provisions of no effect in the case of any proprietor who elected to evade them. I am satisfied that this was not the intention of the Statute and that this is not the effect of its provisions. Both in S. 9, Cl. 3, and in S. 16, Cl. 1, the word used with reference to the proceedings of the civil Court is "shall" and the provisions in question, in my opinion, are binding upon the civil Courts independently of any pleading raised by the defendants in a particular suit. For these reasons therefore I am of opinion that the decision of both the Courts below in this case was correct and I would dismiss this appeal with costs.

Walsh, J.—I entirely agree. As two matters have been strenuously argued, I will add a word or two about them. In the first place, in my opinion, a decision of the Board of Revenue on a question of this sort, although not binding upon the parties, or upon this Court, is a matter which any civil Court is bound to examine very closely. It is a matter essentially for the decision of a Revenue Court and all Revenue Officials are of course bound in deciding the question, when it comes before them, by any decision passed by the Board of Revenue. In my opinion any civil Court, although not bound, ought to follow such a decision of the Board in a matter peculiarly within its knowledge and jurisdiction, unless there were some overriding reason to the contrary. There seem to be several legal grounds on which that Court's order was justified. If the decision of the Board of Revenue were reported, it is obvious that a civil Judge deciding the case would have looked at it. The fact that it is unreported makes no difference. I should have thought that in any event under S. 49, Evidence Act, the Board's decision is a relevant fact as an opinion of an expert upon the meaning of a term applicable to the scheduled districts. The second point which Dr. Sen argued

was that the defendant himself had let this question go by default at the original hearing of the suit. To my mind it is not a question of pleading, or of the rights of the parties strictly so called. It is a question of jurisdiction. Once the circumstances provided by the Act are established in fact, the jurisdiction of the civil Court is ousted. And a Court which did not take notice of the provisions of the Act, whether the parties pleaded them or not, would be acting outside its jurisdiction.

By the Court.—We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1919 Allahabad 430

PIGGOTT, J.

Muqaddas Hussain—Applicant.

v.

Zahuruddin—Opposite Party.

Criminal Revn. No. 220 of 1919, Decided on 29th May 1919, from order of Sess. Judge, Budaun, D/- 8th March 1919.

Criminal P. C. (5 of 1898), Ss. 195 and 435.—Sanction to prosecute upheld by Sessions Court—High Court has power of revision and can set it aside if not proper.

Where a Court exercising jurisdiction under the Criminal Procedure Code sanctions, under S. 195 of the Code, the prosecution of a witness for giving false evidence, and the sanction so given is upheld by the Sessions Judge, acting under Cl. (6), S. 195, the High Court has jurisdiction under S. 435 (1) of the Code to call for and examine the record of the proceeding before the Sessions Judge and to set aside the order if it is not satisfied as to its propriety.

The existing state of the law permitting a revision to the High Court from the order of a Sessions Judge under S. 195 (6) animadverted upon. [P 432 C 1]

J. M. Banerji—for Applicant.

S. A. Haidar—for Opposite Party.

Judgment.—This application in revision comes before this Court under the following circumstances:

One Shamshul Hasan brought a complaint before a Magistrate accusing Zahur Uddin and seven other persons of offences under Ss. 147 and 323, I. P. C. At the trial the present applicant in revision, named Muqaddas Husain, appeared as a witness for the complainant Shamshul Hasan. The evidence then given by him has been read to me and I find that, if the Court had felt itself able to act upon that evidence, it would have convicted Zahur Uddin and other persons of the offences alleged against them. As a matter of fact, the trial ended on 1st

October 1918 in the acquittal of the accused persons. About a month later Zahur Uddin, passing over the complainant Shamshul Hasan and selecting Muqaddas Husain out of the various persons who had given evidence in support of Shamshul Hasan's complaint, applied for sanction under S. 195, Criminal P. C., for the prosecution of Muqaddas Husain for the offence of giving false evidence, punishable under S. 193, I. P. C., alleged to have been committed by him when giving evidence in the criminal case above referred to. Sanction was not sought in respect of any of the statements of fact which formed the material substance of Muqaddas Husain's evidence. Three detached statements were abstracted from amongst the answers which Muqaddas Husain had given in cross-examination and sanction was sought for his prosecution in respect of the same.

The Magistrate directed Muqaddas Husain to show cause why the sanction applied for should not be granted, but eventually passed an order as desired in Zahur Uddin's application. That order was dated 24th January 1919. Muqaddas Husain thereupon applied to the Sessions Judge to revoke the sanction so granted in virtue of his authority under S. 195, Cl. 6, Criminal P. C. The Sessions Judge revoked the sanction granted in respect of two of the statements referred to in the order of sanction but has upheld the same in respect of the one remaining statement. Against this order, dated 8th March 1919, Muqaddas Husain comes to this Court in revision. It took him more than a month to present his application in revision before this Court and it has taken about a month and a half more for the said application to come up for hearing. The result is that more than $\frac{2}{3}$ rd of the entire period of six months, which the Legislature contemplates as being the period for which an order of sanction shall remain in force, have gone by, and all proceedings based upon the said order have remained pending, having been stayed by the order of this Court passed at the time when this application was admitted.

The rights and remedies open to Muqaddas Husain under S. 195, Criminal P. C., were exhausted by his application to the Sessions Judge. If the order of sanction had been one passed by a civil or Revenue Court of competent jurisdiction

in respect of any statements made by Muqaddas Husain as a witness in a civil or revenue proceeding, it is fully settled law that no further remedy would have been open to Muqaddas Husain; he would have had to stand his trial upon any complaint which Zahur Uddin might see fit to file, within the statutory period of six months, on the strength of the sanction granted to him. It so happens in the present case that the original order of sanction was passed by a Magistrate exercising jurisdiction under the Criminal Procedure Code and the subsequent order under S. 195, Cl. (6) of the same Code was passed by a Sessions Judge, this is to say, by a Court of criminal jurisdiction inferior to this Court within the meaning of S. 485, Cl. 1 of the same Code. It cannot therefore be denied that, as the law stands at present, this Court has jurisdiction to call for and examine the record of a proceeding like the present, that is to say, of a proceeding under S. 195, Cl. (6), held in the Court of a Sessions Judge. A further opportunity is therefore afforded to any person against whom sanction has been granted by one authority, and confirmed by an authority no less competent than that of a Sessions Judge, of further obstructing the process of justice by carrying the matter before this Court in the way of an application for revision. I have been referred to more than one reported case in which this Court has not merely entertained an application for revision similar to the one now under consideration, but has actually interfered with the order granting or refusing sanction.

I have never myself denied the authority of this Court to interfere under Ss. 435 and 439, Criminal P. C., as it stands at present. In the case of *Ahsanullah Khan v. Mansukh Ram* (1) I made an express reservation in favour of the revisional jurisdiction of this Court as an ultimate resource to be employed, if necessary, in order to avoid a failure of justice. The question, as it presents itself to my mind, is wholly one of discretion. The result of an order of sanction is at worst that the person against whom that order is passed may have to stand his trial before a competent Court.

(1) A.I.R. 1914 All. 211=25 J.C. 350=12 A.L.J. 511=36 All. 403=15 Cr. L. J. 598.

The law allows a person against whom the allegation is made that he has committed the grave offence of giving false evidence an opportunity of contesting the propriety of any order of sanction which may be passed against him before one Court of superior jurisdiction to that which passed the said order. My own feeling in the matter is that it would be better in the interests of justice that Courts, at any rate, of so high a standing as the Court of Session, should be trusted to make a fair and equitable use of the powers given them by S. 195, Cl. 6, Criminal P. C., and that persons against whom an order of sanction has been passed and has been affirmed by an authority like that of a Sessions Judge should, generally speaking, be discouraged from delaying and obstructing the cause of justice further by invoking the revisional jurisdiction of this Court, unless and until they can show wholly exceptional reasons for so invoking that jurisdiction. This is an easy enough principle to lay down, but the difficulty of applying it lies in the fact that a person coming up to this Court in revision is necessarily heard in the first instance *ex parte* and upon inadequate materials. Once he has obtained an order admitting his application, the main purpose of that application is more often than not fully served.

In the present case at any rate the application of Muqaddas Husain was admitted, and proceedings were stayed, by order of a learned Judge of this Court. Under S. 435, Criminal P. C., the duty has been laid upon me of examining the records of the proceedings in the Sessions Court in this matter of sanction for the purpose of satisfying myself as to the propriety of the order passed. I have been driven to the conclusion that it is wholly impossible for me to profess to be satisfied with the propriety of the order in question. It is an order which I should certainly have refused to pass had the application come before me as a Court of first instance, and had it been my duty to deal under S. 195, Cl. 6, Criminal P. C., with the order of sanction passed by the Magistrate in this case, I should have unhesitatingly revoked the same. The statement in respect of which sanction has been granted for the prosecution of Muqaddas Husain is in the following words:

"I am acquainted with Yakub Ali, son of Unas Ali. He bears no sort of relationship to me."

I understand from an examination of the record of the original criminal trial that it was contended on behalf of Zahur Uddin that there was a feud between himself and the man Yakub Ali, son of Unas Ali, referred to in the above statement. Presumably the intention was to suggest that that feud was so bitter that anyone connected with the said Yakub Ali by any sort of relationship must necessarily be regarded as a prejudiced witness in a case brought against Zahur Uddin. It appears that Zahur Uddin is in possession of information showing that Unas Ali, father of Yakub Ali, was married to a lady whose maternal grandfather was also the paternal grandfather of Muqaddas Husain. I find it difficult to conceive that, if the Court had not before it any stronger reasons for distrusting the evidence of Muqaddas Husain, its opinion as to the veracity of this witness would have been seriously affected one way or the other by the existence of this relationship. Moreover, the matter was not pressed in cross-examination, as, in my opinion, it should undoubtedly have been if there was latent intention of making the witness's answer the basis for a charge of perjury. The form of the question put to the witness simply directed his attention to Yakub Ali, son of Unas Ali. I do not know now whether Zahur Uddin claims to be in a position to prove that the lady Imtiazunnissa above referred to is actually the mother of Yakub Ali, or is merely one of the wives of Yakub Ali's father.

The Magistrate's order of sanction suggests the former, but his review of the documentary evidence laid before him on behalf of Zahur Uddin suggests the latter. In any case the attention of the witness was not drawn to the question of the names of any lady or ladies to whom Unas Ali was married. The answer returned by Muqaddas Hussain may have been a rash one. It may have been merely hasty. If it was intended to make that answer the basis of prosecution for perjury, the question should have been pressed home. His attention should have been definitely drawn to the fact that his cross-examiner was in possession of instructions according to which a relationship between himself and Yakub Ali was traceable, not through Unas Ali himself

but through a lady whom Unas Ali had married. It seems to me that those conducting the defence of Zahur Uddin at the criminal trial never seriously intended to make anything of this question. They were well content with a hasty answer, which it was possible to represent as false in fact and to use as such hereafter for the annoyance of the witness. Had the question of the relationship between the witness and Yakub Ali been regarded by those responsible for the defence as one of any serious importance, the matter could not have been left where it was. For these reasons I am unable to hold that the order under revision satisfies me as to its propriety and, once the revisional jurisdiction of this Court has been invoked in a matter of this sort, it has to be exercised. My order therefore is that I set aside the sanction in question.

V.B./R.K.

*Sanction set aside.***A. I. R. 1919 Allahabad 433**

PIGGOTT AND WALSH, JJ.

Sheobaran Singh — Plaintiff—Appellant.

v.

Bhagwan Sahai and others—Defendants—Respondents.

Second appeal No. 195 of 1917, Decided on 9th December 1918, from a decree of Sub. Judge, Meerut.

Civil P. C. (1908), O. 2, R. 2—Suit for profits against lambardar—Subsequent suit for mesne profits against lambardar and others as trespassers over different portion is not barred.

Plaintiff brought a suit against a lambardar to recover a share of profits lawfully collected by him as lambardar of the mahal in respect of a share as to which the plaintiff's title had never been disputed. Subsequently he brought a suit against three defendants including the lambardar for mesne profits for the same period, on the allegation that they had been in unlawful possession as trespassers over another portion of the mahal which belonged to the plaintiff :

Held: that the causes of action in the two suits being distinct, the subsequent suit was not barred by O. 2, R. 2.

[P 435 C 1]

M. L. Agarwala—for Appellant.*Peary Lal Banerji*—for Respondent.

Judgment.—In this case the plaintiff purchased at auction the entire 20 biswas of a certain mahal. On endeavouring to take possession of the property he was resisted by the three defendants, who claim to be the joint owners of a share of three biswas odd in the said mahal. The plaintiff was driven to

bring a suit for possession in respect of this share. The suit was decreed in his favour as long ago as 29th June 1911 and eventually that decision was affirmed in appeal up to this Court. In that suit the plaintiff, for some reason or other, had omitted to claim mesne profits, and it is not denied that by reason of this omission he can get no mesne profits from the defendants on account of his dispossession up to the date of the institution of the said suit. In the present suit, filed on 31st July 1913, the plaintiff claimed mesne profits on account of the share of three biswas odd from the date of the institution of his former suit up to the date in the month of August 1911, on which he had actually obtained possession under the decree in his favour. Apparently the plaintiff had delayed the institution of this suit while awaiting the result of the appeal from the decision in his favour and one consequence has been that a substantial portion of his present claim is barred by limitation. It is now common ground that, if the plaintiff is entitled to recover mesne profits at all, his claim must be limited to a period of about a year prior to the month of August 1911, when he succeeded in obtaining possession. Practically the question in issue is now limited to the plaintiff's claim for the profits of this share of three biswas odd for the agricultural year 1318 Fasli. The claim was resisted upon various grounds, but we are still concerned only with two preliminary objections taken by the defendants.

The first of these was that the claim for profits was one exclusively cognizable by a Revenue Court and therefore barred so far as the civil Courts are concerned by the provisions of S. 167, Local Tenancy Act (2 of 1901). The other plea was that the present claim is also barred in its entirety by the provisions of O. 2, R. 2, Civil P. C. This plea is based upon the fact that, a few days before the institution of the present suit, the plaintiff had brought a claim against one of the present defendants, namely, Bhagwan Sahai, who was lambardar of the entire mahal, on account of the profits, not of the share now in dispute, but of the remaining share of 16 biswas odd, as to which the plaintiff's title under his auction-purchase was not, and never had been dis-

puted. The profits claimed in respect of the share of 16 biswas odd were for the agricultural years 1317 and 1318 Fasli. The contention therefore is that any claim, which the plaintiff may have against these defendants on account of the profits of the share of three biswas odd for the year 1318 Fasli, should have been included in his claim against the lambardar Bhagwan Sahai in the suit which was limited to the profits of the share of 16 biswas odd.

The Court of first instance decided both these points in favour of the defendants and dismissed the suit. On first appeal the learned Subordinate Judge pronounced no decision with regard to the objection taken under O. 2, R. 2, Civil P. C., but held that in any event the plaintiff's claim for the profits of the share of three biswas odd should have been brought before a Revenue Court and that the Court of first instance had rightly refused to entertain it by reason of the provisions of S. 167, Tenancy Act. In coming to this decision both the Courts below had overlooked the expression "except in the way of appeal as hereinafter provided" used in S. 167 aforesaid, as well as the subsequent provisions of S. 196 of the same Act. When the case came before this Court in second appeal this point was taken on behalf of the plaintiff. The learned Judge of this Court who decided that appeal, by an order dated 15th June 1916, confined himself to pointing out the obvious error into which the Courts below had fallen. He pronounced no opinion as to whether the suit was one which ought, as a matter of fact to have been instituted originally in a Revenue Court or in a civil Court. In either case it was obvious that the provisions of S. 196, Tenancy Act (2 of 1901) applied to the case and that the Court of first appeal should have enforced those provisions. The case therefore went back with a direction to the lower appellate Court to dispose of the appeal as if the suit had been instituted in the right Court.

The learned Subordinate Judge, having received the case back with this direction, has once more dismissed the plaintiff's claim this time upon a finding that the suit is barred by the provisions of O. 2, R. 2, Civil P. C. The plaintiff has been driven to filing another second

appeal against the decision on this preliminary point.

If we limit our attention strictly to the provisions of the rule in question, the only point which we have to consider is whether the cause of action for the present suit is the same cause of action for the suit brought against Bhagwan Sahai as lambardar of the mahal for the profits of the years 1317 and 1318 Fasli due to the plaintiff in respect of his undisputed title to the share of 16 biswas odd.

The question stated in this way seems only to admit of one answer, namely, that the causes of action are not the same. One was a suit against the lambardar to recover a share of profits lawfully collected by him as lambardar of the mahal in respect of a share as to which the plaintiff's title had never been disputed. The present suit is against three defendants on the allegation that they have been in unlawful possession as trespassers over a share of three biswas odd belonging to the plaintiff for a certain period of time, including the year 1318 Fasli to which the present claim is now limited. As a matter of fact we have had to consider a very ingenious argument put forward on behalf of the defendants-respondents and supported by a certain amount of authority. The truth of the matter is that the questions raised by the two preliminary objections stated at the commencement of this judgment are to a certain extent connected together. It is a pity that the lower appellate Court ever undertook to separate them and to dispose of one of them singly. One unfortunate result of this has been that the plaintiff has had to file two second appeals in order to secure a trial of his suit on the merits. As put to us in argument the case for the respondents amounts virtually to this: it being admitted that Bhagwan Sahai was lambardar of the whole mahal right up to the close of the year 1318 Fasli, no suit will lie against any of the defendants on the allegation that they were unlawfully in possession as trespassers over the plaintiff's share of three biswas odd, the only remedy open to the plaintiff upon this state of facts being to sue Bhagwan Sahai alone as lambardar for the share of the profits due in respect of his fractional share. Authority for this proposition is sought

in the case of *Amin-ul-lah v. Hajra* (1); in which a learned Judge of this Court purported to follow an older decision to be found in the *Weekly Notes for 1894* at p. 127: *Bhola Nath v. M. Buskin* (2).

If we thought it necessary to do so we should be prepared to give expression to certain doubts which we feel as to the correctness of the decision in *Amin-ul-lah v. Hajra* (1), but whether or not that case was rightly decided we have no doubt whatever that the present case is distinguishable upon its facts. A claim for profits under the Tenancy Act (No. 2 of 1901) is only a form of suit between joint owners of property in which one joint owner, without dispossessing the others, has managed to secure for himself more than his fair rateable share of the profits accruing from the said property. In the case of a suit against a lambardar the only difference is that the defendant is a person authorized under the law to receive the profits of the entire mahal on behalf of all the cosharers. In the present case the plaintiff was the lawful owner of the entire mahal from the date of his auction-purchase, and it was only by reason of a wrongful act on the part of the three defendants that he was kept out of possession of the share of three biswas odd and prevented from enjoying the profits of the same for a certain period of time including the year 1318 Fasli. Under these circumstances there seems no reason whatever why the present suit should not be maintainable on the basis on which it has been brought, namely as a claim for mesne profits against three trespassers who by reason of their unlawful possession over the share of three biswas odd have been keeping the plaintiff out of the enjoyment of the profits of the same.

It has been sought on behalf of the respondents to press against the plaintiff certain arguments derived from the frame of the suit, in order to induce us to hold that the said suit, although on the face of it a claim for mesne profits as against three trespassers, was in substance and reality something different. On this point it seems sufficient to say that the plaintiff, when he instituted the present suit, was in difficulties on the question of limitation. In an attempt to evade these difficulties he has drafted a portion

of his plaint in a form not strictly consistent with the nature of the claim itself, his object being to make it appear that his claim in respect of profits for the year 1317 Fasli was also within limitation. That point has now been given up, the appeal before us being limited to the claim for profits for the year 1318 Fasli. Consequently it seems only fair to the plaintiff to hold that those portions of his plaint which have been pressed in argument before us do not really bear the interpretation sought to be put upon them and do not change the nature of the suit so as to make it anything but a claim for mesne profits against trespassers. In our opinion the lower appellate Court ought to have reversed the decision of the Court of first instance upon this second preliminary point and sent the case back for trial on the merits, that is for the ascertainment of the simple question of fact, namely the amount of profits for one year prior to the institution of this suit, that is to say, for the year 1318 Fasli, of which the plaintiff has been deprived by reason of the trespass of the three defendants. We now pass the order which, in our opinion, the lower Court ought to have passed.

We reverse the decision of the first Court on the preliminary point and send the case back to the Court of first instance through the lower appellate Court in order that it may now be finally taken up and disposed of on the merits, it being understood, as already stated, that the claim is now limited to a sum of Rs. 175 as profits for the year 1318 Fasli. We think the plaintiff is in any event entitled to his costs of this appeal, and we order accordingly.

V.B./R.K.

Appeal allowed.

A. I. R. 1919 Allahabad 435

PIGGOTT AND WALSH, JJ.

Mt. Kadma Pasin—Judgment-debtor—Appellant.

v.

Muhammad Ali—Decree-holder—Respondent.

Second Appeal No. 493 of 1918, Decided on 7th February 1919, from decision of Dist. Judge, Allahabad, D/- 14th March 1918.

Civil P. C. (1903), O. 34, R. 14—Words “claim arising under mortgage” mean any claim arising under mortgage—Mortgaged

(1) [1906] 3 A. L. J. 767=(1906) A. W. N. 222.

(2) [1894] A. W. N. 127.

property leased to mortgagor—Decree for money obtained by mortgagee—Mortgaged property cannot be sold in execution.

Certain property, comprising a fixed rate holding and also the right to collect a portion of the dues received at a certain temple, was mortgaged by the defendant to the plaintiff with possession. The mortgagor obtained possession of the holding but with regard to the temple dues he entered into a further contract with the mortgagor, whereby the latter undertook to pay to the former a certain sum every year in return for the right to make the collections. The mortgagor having made default in payment of this sum, the mortgagee brought a suit on the basis of the contract and obtained a decree. In execution of this decree he sought to bring to sale the equity of redemption of the whole of the mortgaged properties :

Held : that the claim in respect of which the decree had been obtained by the mortgagee was a claim arising under the mortgage within the meaning of R. 14, O. 34 and that the mortgagee was not therefore entitled to bring the mortgaged property to sale in execution of his decree. [P 438 C 1]

Per Walsh, J.—In order to escape the mischief aimed at by O. 34, R. 14, Civil P. C., the claim of the mortgagee must be distinct from, that is to say, unconnected with the mortgage transaction. [P 439 C 2]

The words "a claim arising under the mortgage" in R. 14, O. 34, Civil P. C., mean any claim arising under the mortgage. [P 439 C 1]

Ibni Ahmad—for Appellant.

Shiva Prasad Sinha for *Nowal Kishore*—for Respondent.

Piggott, J—In this case the two Courts below have differed upon a question of law of some difficulty regarding the application of the provisions of O. 34, R. 14, Civil P. C., to the facts of this particular case. The respondent obtained from the original judgment-debtor-appellant a possessory mortgage in respect of certain property. That property comprised a fixed rate holding and also the right to collect a portion of the dues received at a certain temple. Under the terms of the mortgage the mortgagee was entitled to possession over the holding and to realize for himself the share of the temple dues specified in the document. We are informed that he obtained possession over the fixed rate holding. With regard to the temple dues the respondent, who is a Mahomedan, seems to have found some difficulty about realizing them himself. He entered into a further contract with his mortgagor, which may be described as a lease or farm of the right secured to the mortgagee of collecting these dues. The mortgagor undertook to pay to the mortgagee a sum of Rs. 700 a year in return for the latter's

permission to realize what she could for herself out of the dues in question. The mortgagor having made default a suit was brought on the basis of this contract of farm or lease, and a decree obtained. In execution of this decree the respondent has attached, and seeks to bring to sale, the equity of redemption in respect of the whole of the property which formed the subject-matter of the original mortgage in his favour. The question is whether an order for sale of this property is or is not forbidden by O. 34, R. 14, Civil P. C. The Court of first instance held that, on the plain words of the said rule, the decree for money obtained by the respondent was a decree for the payment of money in satisfaction of a claim arising under the mortgage and that the sale of the equity of redemption in the mortgaged property was therefore prohibited under the terms of the rule. The learned District Judge has reversed this finding on appeal, being evidently influenced by the decision of this Court in *Haribans Rai v. Srinivas* (1).

That case undoubtedly comes very close to the case now before us and I am not surprised that the learned District Judge felt obliged to treat it as a decisive authority in favour of the decree-holder. At the same time the present case is distinguishable on the facts and I very much doubt whether the learned Judges who decided the case of *Hribans Rai v. Srinivas* (1) would have been in favour of the respondent in the appeal now before us. They seem to have held that the decree for costs, which was sought to be executed in the case then before them, represented not money due to the decree-holder as mortgagee, but merely a sum of money to which he was entitled as a successful litigant. They therefore held that the decree in the case then before them was not one for the payment of money in satisfaction of a claim arising under the mortgage. It must be remembered that there has been an alteration in the law, since the provisions of O. 34, R. 14, of the present Civil P. C. 5 of 1908) were substituted for those of S. 99, T. P. Act, 4 of 1882. It is therefore of very little use to refer to rulings anterior in date to this change in the law. For instance, there has been considerable controversy before us as to the bearing on

(1) [1913] 35 All. 518=20 I. C. 896.

the present case of the principles laid down by the learned Judges of this Court in two cases, one reported as *Altaf Ali Khan v. Lalta Prasad* (2) and the other as *Chimman Lal v. Bahadur Singh* (3). The former case is relied upon by the appellant and the latter by the respondent. It seems sufficient to say that both these cases were decided at a time when the mortgagee could in no event have brought the mortgaged property to sale in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not.

The question which we have now to consider was therefore not present to the minds of the learned Judges who decided those two cases. They had to determine whether under particular circumstances, the remedy of a particular mortgagee was or was not confined to a suit for sale upon his mortgage and whether or not it was open to him, at least as an alternative relief, to obtain a simple money decree, by way of arrears of rent or the like, against his mortgagor. No question could be raised under the law as it then stood as to the right of the mortgagee to execute such decree, when obtained, by attachment and sale of the mortgaged property. Apart from the case which the learned District Judge has treated as decisive, there seems to be only two other decisions since the passing of Act 5 of 1908 which deserve notice. One of these is the case of *Ganesh Singh v. Debi Singh* (4) and the other is *Tarak Nath Adhikari v. Bhubaneshwar Mitra* (5). Both these cases seem to me a good deal in favour of the appellant. In the former it is true that the usufructuary mortgagee there concerned was permitted to bring the mortgaged property to sale in execution of a simple money decree. The learned Judges however laid particular stress on the fact that the decree then in question was passed upon a compromise. In effect, as it seems to me, they regarded the compromise decree under which the mortgagor became liable to the mortgagee for the payment of a certain sum of money as a contract superseding and abolishing the previous contract of mortgage.

On this view of the case there remained

no mortgage in existence which could be set up by the judgment-debtor so as to invoke the provisions of O. 34, R. 14, Civil P. C. I think that the way in which the learned Judges laid stress upon the fact that the decree in the case before them had been passed upon a compromise and was therefore the result of a fresh agreement or contract between the parties, suggests that their decision would have been different if they had had to deal with a decree for money passed after contest. The Calcutta case was the converse of the present one and as a matter of fact resulted in an order in favour of the decree-holder; but the principle laid down by the learned Judges was that the prohibition contained in O. 34, R. 14 would operate in respect of any decree of which it could not be said that it was unconnected with mortgage-debt. In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage.

His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage; but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money just as much as arrears of interest which if falling due on a contract of simple mortgage, become part of the mortgage money; in the second place it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage. The learned District Judge has interpreted the principle down in the decision of *Haribans Rai v. Srinivas* (1) as if the learned Judges had intended to lay down that the true test was whether or not the money for which a decree had been obtained was money which could have been claimed in a suit for sale upon the mortgage. This goes, I think, a little beyond the actual ratio decidendi of the case in question. Moreover, although the test may be a satisfactory one in the case of claims arising out of a simple mortgage, it is not so easy to apply it to the case of a usu-

(2) [1897] 19 All. 496.

(3) [1901] 23 All. 338.

(4) [1910] 32 All. 377=5 I. C. 419.

(5) [1915] 42 Cal. 780=30 I. C. 988.

fructuary mortgage. The provisions of the Transfer of Property Act assume that a person in whose favour a contract of usufructuary mortgage has been entered into has either been put in possession of the mortgaged property or has not. In the latter event he would have a right to sue for his money under S. 68, Cl. (c), T. P. Act (4 of 1882). In the former event it is presumed that he would be in full enjoyment of all his rights in respect of the usufruct of the mortgaged property. Difficulties may arise however in applying this principle where the mortgagor has entered into a subsidiary agreement with the usufructuary mortgagee, so that it may be said that the mortgagee is constructively in possession by virtue of his subsidiary contract with the mortgagor, but the latter is nevertheless withholding from the mortgagee the money which he had covenanted to pay.

I think that this is a risk which a usufructuary mortgagee must be content to run when he chooses to enter into a transaction the effect of which is to replace the mortgagor in actual possession over the mortgaged property, or any part of it. There is nothing in law to prevent the parties to a mortgage from entering into such an agreement; but the fact that the mortgagor has become liable by reason of such subsidiary contract to make certain payments to the mortgagee does not affect the consideration that the money so agreed to be paid represents the usufruct of the property to which the mortgagee was entitled by virtue of the possessory mortgage in his favour. If the mortgagee chooses to enter into a contract of this nature, and the mortgagor fails to carry out his part of such contract, the remedy of the mortgagee is to obtain a simple money-decree for the money due to him. I think however that it would be doing violence, both to the letter of O. 34, R. 14, Civil P. C., and to the principle on which that rule is based, to allow the mortgagee to take advantage of a decree of this nature in order to bring to sale the equity of redemption and deprive the mortgagor of his right to redeem the original mortgage. The Courts are bound to hold that the money in respect of which the decree was passed represents, in substance, the usufruct of the mortgaged property, and that the claim to it was a claim arising

under the mortgage. In my opinion therefore the decree of the lower appellate Court must be set aside and that of the Court of first instance restored with costs throughout, including in this Court-fees on the higher scale.

Walsh, J.—I have arrived at the same conclusion. Although the circumstances of the arrangement are somewhat peculiar as I shall mention in a moment, I think they raise in the clearest possible form the question what is the right interpretation of the words "a claim arising under the mortgage" used in the new O. 34, R. 14. The case has been extremely well argued on both sides and I do not think any relevant consideration or existing authority has been omitted from the discussion.

The mortgage was a usufructuary mortgage to secure a debt of Rs. 8,000 in which a certain fixed-rate tenancy was hypothecated, and also a right during fourteen days in each year to collect certain dues at a temple which had been bequeathed to the mortgagor by her paramour. The mortgagor was a Pasi by caste and the mistress of the Panda who bequeathed this right. The mortgagee was a Mahomedan and the difficulties not unnaturally consequent upon his making such collections were got over by an agreement made six months after the original mortgage, under which the woman gave to the mortgagee in lieu of the usufruct of the collections of the dues an undertaking or covenant to pay a fixed sum of Rs. 700 a year. In addition to this the agreement provided that upon default being made in the payment of that fixed sum interest should run upon the arrears at 12 per cent. per annum. Inasmuch as the mortgagee was in possession of the fixed-rate holding, although we know nothing about the actual proceeds of this security, it is obvious that such an arrangement made by the woman in discharge of her obligations under the mortgage was a most improvident bargain. These circumstances do not affect my judgment in the interpretation at which I feel myself obliged to arrive, but they do point to the necessity of holding fast to the old principle upon which this restriction imposed upon mortgagees is based and not straining the language in order to extend the mortgagee's rights over the equity of redemption. The mortgagee obtained a decree for Rupees

3,762-6-0 with costs and pendente lite interest and future interest, and the question before us is whether he can execute that decree upon the property mortgaged.

I have come to the conclusion that he cannot. In whatever way the matter is regarded, it seems to me that a suit to enforce the agreement by which the parties stipulated how that part of the usufruct which concerned the collection of dues should be met, can only be described as "a claim arising under the mortgage."

"A" as used in this connexion must mean "any." The point really cannot be better put than it is put in the learned Subordinate Judge's judgment where he says:

"It seems to me to be drawing an unjustifiably subtle distinction to say that the claim arose not under the mortgage, but under the separate agreement when that agreement was made as a direct consequence of the mortgage, and as a means of giving effect to the conditions of the mortgage."

The language formerly in operation under S. 99, T. P. Act, was "whether arising under the mortgage or not." The change effected by O. 34, R. 14, was clearly intended to improve the mortgagee's position and to remove to some extent the existing restriction, but it must be taken that it was not intended by the legislature, otherwise very different language would certainly have been adopted, to affect the principle, long established by equity Courts and always acted upon in India and reiterated by the Privy Council in *Khiarajmal v. Daim* (6), that the mortgagee cannot, by obtaining a money-decree for the mortgage-debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his rights to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage. In my opinion the mortgagee's claim in this case, if successful, would offend against this principle. The existing rule does not confine the restriction imposed upon the mortgagee to a claim to enforce the mortgage debt as such, but expressly provides that it shall include any claim arising under the mortgage. In construing such a provision we are bound to look at the authorities which laid down the principles by which the Courts were guided and which the Code was in-

tended to codify. To escape the mischief aimed at by those principles and by this legislation the claim of the mortgagee must be distinct from, that is to say, in my opinion, unconnected with the mortgage transaction. This is the view taken by the Calcutta Bench in the decision in *Tarak Nath Adhikari v. Bhuvaneshwar Mitra* (5) to which my brother has referred, in which, although the Judges were dealing with the converse case, the language they used clearly applies to this case and in my opinion is correct. The same view is taken in the notes to O. 34, R. 14, in the last edition of Woodroffe and Ameer Ali's Commentary on the Code, and it is there pointed out that if the restriction were confined to cases of what, to use the English expression, are known as "judgments on the covenant," the benefit of the equity of redemption given to the mortgagor would be lost in respect of claims arising under the mortgage, and it seems to me that the legislature has been careful to use language avoiding that result.

Whether or not I should have come to the same decision as the Bench of this Court in the authority *Haribans Rai v. Srinivas* (6), to which my brother has referred and which the learned District Judge in this case not unnaturally used to persuade himself as to the interpretation which he adopted, does not matter. The view which they took in that case undoubtedly was that a claim for costs arising out of a decree stood upon a footing of its own. The decree of a Court on the claim of the mortgagee under his mortgage and the costs in execution of his order for which the mortgagee made application, might no doubt be said to arise not under the mortgage but under the unsuccessful resistance made by the mortgagor in the original claim which the mortgagee made against him. I do not think that case can be treated as having decided anything more than that, and, it does not govern the wider question which is raised in the appeal before us. I agree with the order proposed.

By the Court.—The appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs throughout including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

(6) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P. C.).

A. I. R. 1919 Allahabad 440

WALSH AND STUART, JJ.

Puran Mal—Defendant—Appellant.

v.

Ford and MacDonald & Co.—Plaintiffs—Respondents.

Second Appeal No. 696 of 1918, Decided on 14th May 1919, from decree of Second Addl. Judge, Aligarh.

(a) **Accounts—Settled—Reopening**—Principles of English law apply—Accounts settled can be reopened if there are numerous errors or where parties are in fiduciary relationship where there is fraud.

As the law on the question of reopening settled accounts is not contained in any Indian legislative enactment, the guiding principles of English law must be applied, whereby a Court will reopen an account only where the accounts are shown to be erroneous to a considerable extent both in amount and the number of items, or where fiduciary relations exists and a less considerable number of errors is shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the accounts are shown.

[P 441 C 2; P 442 C 1]

(b) **Civil P. C. (1908), O. 6, R. 4—Suit by firm against dismissed agent who had settled accounts with firm's representative—Appellate Court allowing reopening on ground that fraud exists—In absence of specific allegation of instances of fraud finding held improper—Suit was governed by Limitation Act (1908), Arts. 62 and 90.**

A firm instituted a suit against its former agent, (a) to reopen a settled account, and (b) for an account of the profits which the defendant had made in a business similar to that of the plaintiff firm and owned by the defendant. It appeared that the plaintiff firm were engaged in an extensive brick-making business, and had employed the defendant as one of their agents in charge of an agency. After very many years' service, they discovered that the defendant was interested in, if not the actual proprietor of, a brick-making business at a place some five or six miles from where the firm's agency was located, and which, in some respects, was adverse to the interests of the firm. His services were accordingly dispensed with but, before he made over charge of the agency, a settlement took place between himself and an accredited representative of the firm, an entry being made in the ledger that the accounts had been checked and the cash balance found correct. Charge was then made over on that date of the stock and cash in hand, the entry being signed by the defendant and the representative of the firm. Subsequently the firm instituted the present suit. The trial Court dismissed the suit. The lower appellate Court however decreed the reopening of the account, and for a rendition of accounts of the defendant's business holding that in at least five instances fraud had been established against the defendant, and that in one instance an error of every great importance was shown. On appeal to the High Court:

Held: (1) that there was no legal justification for the finding of fraud, inasmuch as no specific instance of fraud had been alleged in the plaint and the finding was based on a superficial inves-

tigation and either on no evidence or on a careless view of the evidence;

(2) that therefore the claim for reopening of the accounts was not sustainable;

(3) that as regards the claim for rendition of the accounts of the defendant's business, the suit was governed by either Art. 62 or Art. 90, Sch. 1, Lim. Act, and not having been brought within the period prescribed therein, it was barred by limitation.

(c) **Contract Act (1872), S. 188—Agents, duty—He must not place himself in position which would be adverse to his principal—Principal and Agent.**

It is the duty of an agent not merely to do nothing to injure the interests of his principal, but to do all in his power to further them, and therefore not to place himself in a position in which his interests might be adverse to those of his principal. [P 444 C 1]

G. W. Dillon, Satya Chandra Mukerji and Girdhari Lal Agarwala—for Appellant.

Surendra Nath Sen and Purshottam Das Tandan—for Respondents.

Walsh, J.—This was a suit brought by a firm, Messrs. Ford and MacDonald & Co. Ltd., against their former agent Puran Mal and another man Badri Prasad who is not before us. The plaintiff company is now a limited liability company. It was formerly a firm of considerable standing and carried on an extensive business, a large portion of which was devoted to the making and selling of bricks. While it remained in its original form as a firm and for some two years after the formation of the limited company, the present appellant, who was sued by the plaintiff company, was their agent to manage the Saharanpur branch and others. There were in addition to the agencies committed to his charge other agencies, Badri Prasad being the agent for the Agra branch which included a sub-agency at Muttra. The defendant Puran Mal worked for this firm for very many years, and it is not unimportant, having regard to the charges now made against him, to bear in mind that he was given, according to the evidence in the case, a pretty free hand and apparently during a long period of service gave satisfaction.

We mention that fact because we think that amidst the difficulties of ascertaining the exact truth with regard to each item in the books, perhaps sufficient importance has not been given to the fact that Puran Mal was left very much with a free hand, the result of that policy being not of course to entitle a man to rob his principal, but, on the other hand, necessarily to result in a somewhat less

exact and precise method of recording his transactions. Mr. Parry, who was at the material time a principal of the firm, or director of the company, and who is now Municipal Engineer at Cawnpore, gave evidence in the case and said that Puran Mal left the employment of the firm in December 1913 by mutual consent, largely on account of the firm having discovered at some prior date Puran Mal's connexion with, if not proprietorship of, a brick-making business in Bindraban, which is some six or seven miles from Muttra and which could hardly fail in some respects to be adverse to the interests of his employers who were largely concerned in the brick making business. What he said was:

"We were annoyed with Puran Mal on his working a brick kiln at another place, probably at Bindraban, and so we dispensed with his services. We did not dismiss him. The work at Delhi agency was complete or nearly so and we could not find work for Puran Mal at another agency. That was also one of the reasons of his services being dispensed with."

When Puran Mal left, the accounts up to that date between his principals and himself were necessarily considerable and the course of business had covered a considerable period. At that date, a settlement took place between Puran Mal himself and an accredited representative of the firm. It was not drawn up in any formal document but an entry was made in the ledger, which we have seen, stating that the accounts have been checked and the cash balance in hand is ascertained and found correct. The charge was made over on that date with stock and Rs. 9-8-9 in cash, some of which was noted to consist of bad coins. These entries in the ledger were signed by Puran Mal on his own behalf and Mr. Lansbury on behalf of the plaintiff firm; inasmuch as no other interview took place at which any suggested settlement was attempted, we are satisfied that this was, as it has been called, a settlement of accounts stated between the parties finally settling their respective claims up to that date, with the exception of a private account or bonus account in the form of commission which Puran Mal had against his employers. In respect to this latter transaction Puran Mal was eventually driven to bring a suit in the year 1914 and he claimed in that suit Rs. 40,000 and the claim was compromised at a sum of Rs. 20,000.

It is not without bearing upon the general aspects of the case that, although the plaintiffs' counsel was justified in saying that the plaintiffs were not bound to bring a cross-claim or a cross-suit to assert the claim that they are now making, nonetheless they refrained from doing so. Subsequently, a person of the name of Manphul appeared upon the scene as a kind of expert, or private detective, and entered the employment of the firm after having been unsuccessfully prosecuted by them through Puran Mal, and it is largely the result of his industry that the plaintiff company, the leading members of which had been replaced by some other persons who had taken an interest in the company, filed this suit claiming against the two defendants, the present appellant and his co-defendant Badri Prasad: (a) to reopen the settled accounts, and (b) an account of profits which Puran Mal had been making in a separate brick-making business of his own at Bindraban, which Mr. Parry has mentioned as the cause of the determination of his agency. The first Court dismissed the plaintiffs' claim with a certain amount of contempt. On appeal the lower appellate Court has decreed against both defendants the reopening of their accounts with the plaintiff firm, obviously leading to a very serious and elaborate inquiry, and also a rendition of account as against Puran Mal of the brick-making business at Bindraban. The question we have to decide is, whether those decisions or either of them is right. The judgment of the learned District Judge has been defended by the plaintiffs' counsel, Mr. Bradley, who argued his case with great ability and gave us every assistance in the investigation of this troublesome matter. As we have stated, the claim consisted of two perfectly distinct causes of action. The first cause of action was sought to be established by six specific items which have been dealt with by the lower appellate Court being instances of cases in which it is alleged that it can now be shown that Puran Mal, to put the matter plainly, robbed his employers. In five of those instances the learned Judge has held that clear cases of fraud have been established. With regard to the sixth he has come to the conclusion that an error of very great importance is shown. The law on the question of reopening settled accounts is not contained in India

in any express enactment. Applying the ordinary rule, we have therefore to ascertain as best we can what are the guiding principles of the English law upon the question which is generally considered to be the test of equity, justice and good conscience. The leading case upon the subject appears to be *Williamson v. Barbour* (1) decided by the Master of the Rolls, Sir George Jessel, in 1877, and the rule applicable to this class of cases and which we propose to apply in this appeal is stated in these words:

"Where you show a single fraudulent entry in the case of persons occupying the position of principal and agent or trustee and cestui que trust the Court has actually opened an account extending over a greater number of years and closed for a much longer period than the account I have before me. I mean in the case of *Allfery v. Allfery* (2) before Lord Cottenham. We therefore have this as a sort of guide without laying down any general rule because every case must depend on its own circumstances that where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items or where fiduciary relations exist and a less considerable number of errors are shown or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown there the Court opens the account and does not merely surcharge and falsify."

So far as India is concerned that authority has been adopted by the Bombay High Court in the case of *Boo Jinatboo v. Sha Nagar Valab Kanji* (3), and we adopt that as being the law governing the Courts in India. Personally I would myself have thrown out a greater part of this suit if not the suit in its entirety, upon the grounds laid down in the judgment of Lord Westbury in *Parkinson v. Hanbury* (4), that substantially no attempt was made in the plaint to specify any single instance upon which the plaintiffs relied for opening up the whole account. It is perfectly true that the burden of requiring the plaintiffs to do that lies on the defendant and in this case the defendant did not exercise the right which he had. But nonetheless the Court cannot escape its own duty by the neglect of the parties and in my view at any rate in a suit of this character nothing can illustrate more forcibly than the difficulty which we have ourselves experienced in hearing the appeal the necessity of insisting upon

the plaintiff making clear both to the Court and his opponent all the precise matters relied upon. Not a single instance of the specific fraud eventually found by the lower appellate Court in this case is alleged with any approach to specification or any approximation to precision or accuracy in the plaint and the learned Judge of the lower appellate Court has on a good deal of plausible suggestion which after all was really based on a superficial investigation, found these five specific cases of fraud without in our opinion any legal justification for such finding. The fundamental defect which runs through the learned Judge's consideration of the case—I may note here that Mr. Bradley rightly urged upon us that we had no right to interfere and we do not propose to interfere with any specific findings of fact arrived at by the learned Judge if they are supported by any evidence—is that he overlooked the admitted fact which was common ground throughout the case that the accounts under inquiry had been submitted to a systematic and periodical audit by one of the employees of the plaintiff company and also the whole account had in the ordinary way of business firms been audited from time to time by a firm of professional accountants. Neither of the auditors was called to explain how these matters which the learned Judge has found were deceits practised upon the firm escaped the observation of the auditors themselves.

In most if not all of the important cases we have investigated the entries in the books. They contain auditors' checks which lead us to think that they had been properly vouched in the presence of the auditors. No material vouchers have been produced by the plaintiff company and nobody in the plaintiffs' employment who could throw any light upon these transactions and was employed by them at the time they took place, was called. The only person who could be described as a member of the firm and was put in the box is Mr. Parry, and his evidence as far as it went was in favour of the defendant. The whole case seems to have been built up by the investigation of this expert detective, who had no first hand knowledge of the subject, with the addition of surmise and suspicion resulting, as is not unusually

(1) [1878] 9 Ch. D. 529.

(2) [1847] 10 Beav. 353.

(3) [1887] 11 Bom. 78.

(4) [1867] 2 H. L. 1.

the case, in a good deal of misunderstanding and vague inference.

The first case taken by the learned Judge, and as he candidly says in his judgment it was one which substantially influenced his mind in deciding at least one if not more than one of the other cases, was an alleged fraud by the defendant in wrongfully appropriating to himself a sum of Rs. 2,000. The highest at which this case can be put in fact against the defendant, and we are by no means satisfied that even this is shown by the books, but accepting the learned Judge's finding upon it, is this that from 8th April 1911 to 31st May 1911 the defendant kept in his own possession and used for his own purpose a sum of Rs. 2,000 which belonged to his principals. Inasmuch as the whole of the working capital was floating and considerable cross accounts were carried on between the various branches, it is by no means clear that the principals were deprived of the benefit of this sum. But if they were, all they could possibly have lost was a sum of Rs. 23 calculated as interest at the rate of eight per cent for the use of the money during that period. Inasmuch as this money was used, whether rightly or wrongly, by Puran Mal at a time when his principals were indebted to him in a sum of at least Rs. 10,000, if not considerably more, it is difficult to understand how anybody could have convinced himself that this was a clear case of fraud. It does not bear a scintilla of fraudulent characteristic about it, and we do not agree with the view which Mr. Bradley pressed upon us that the facts so stated would constitute an offence under the Penal Code.

The next finding is even more lamentable, because the conclusion seems to have been arrived at by an extremely careless view of the material evidence on the point. In the account which the plaintiffs seek to re-open was alleged to be a debt due to the firm from a man named Karehra of Rs. 230. This debt was the balance of an account earlier in date, shown to be due from the man in September 1912. The account, as we have said, was closed in December 1913. It was therefore necessary to show if this, as the learned Judge has said, were a clear case of fraud, that the Rs. 230 had been paid to Puran Mal and that when he carried it forward as a debt due to the

firm he knew that the debtor had discharged it before September 1913. There is not a scrap of evidence upon the point. The man went into the box and told the story, which we have no right either to believe or disbelieve and which the learned Judge accepted, that he had at some time or another worked off this Rs. 230 with Puran Mal in labour. If that is true, it was a very improper proceeding on the part of Puran Mal, but it ought to have been obvious that if it took place after December 1913 it could have no bearing upon the account. Nobody condescended to ask him the question when the work was done in payment of this account, and is entirely consistent with the evidence in the case that it was done in the year 1914 or even later. That being so, the case of fraud wholly breaks down.

As to the third item it is sufficient to say that it is not shown that the payment in question, namely Rs. 200, was not misappropriated by Badri Prasad if by anybody and the respondents' counsel had to admit that the learned Judge himself had come to a finding on this point, namely, that the money was restored after nine months, without any evidence to justify it. It is clear that the learned Judge did not investigate this case.

In the fourth case a sum of Rs. 637 is alleged to have been paid in advance to a contractor. The learned Judge did not trouble to investigate whether a voucher existed for this payment although in fact it must have been vouched by the auditors, but further than that the learned Judge merely came to the same conclusion that either the defendant or somebody else must have received the money. Upon such a conclusion as this no charge of fraud can be held to be established. In the fifth case, which is a small item and in which the defendant is supposed to have supplied flour to his friends at the expense of his principals, it is sufficient to say that the learned Judge assumes, we have little doubt, because of the adverse findings at which he has arrived at the earlier stage of the case, that the defendant had in fact done so. There is really not evidence worthy of the name to establish fraud.

The sixth item is held by the learned Judge to be a serious error. It may have been an error in the account; we are not

called upon to decide one way or the other; but if it be one, it is an error of the Agra agency for which Badri Prasad would be answerable and not this defendant. So far as I am concerned, the five main charges having wholly broken down, I should in any event have been prepared to treat a mistake of this kind as one of little or no importance. Certainly there is no such ground as justifies the reopening of the account within the rule of *Williamson v. Barbour* (1). In our opinion, the case for reopening accounts fails and further the plaintiffs have also failed to make out a case for surcharging the defendant with any specific item. This portion of the suit must be dismissed with costs. We now come to the second cause of action, which from the legal point of view has given us a little trouble. As I have already stated, the defendant in some way or another—the facts are not at all clearly found but the substance is not disputed by the defendant—became interested in, if not a proprietor of, a brick-making business in Bindraban and ran this concurrently with the agency which he was carrying on for the plaintiffs, so near to Muttra that it is impossible for anybody to say that within the meaning of S. 88, Trusts Act of 1882, his interest might not become adverse to Messrs. Ford and MacDonald and Co., Ltd. To put the matter plainly Messrs. Ford and MacDonald and Co., Ltd., had a subbranch at Muttra interested in carrying on their business as a whole which, as I have said, included brick-making on a considerable scale and it was the duty of the defendant as agent, not merely to do nothing to injure the interests of the firm, but to do all in his power to further them, and therefore not to place himself in a position in which his interests might be adverse.

It is quite obvious that with a brick-making business belonging to the defendant at Bindraban in the same district where prices would, no doubt, rule at the same rate, an order for bricks arriving addressed to him at Muttra and dealt with by one of his servants at Muttra might quite easily have been forwarded to and executed by his brick-making business at Bindraban. It is not necessary for us to look outside the provisions of the section. We think that that section made him hold any pecuni-

ary advantage which he derived from the Bindraban brick business for the benefit of Messrs. Ford and MacDonald and Co., Ltd.

In this respect we agree with the lower appellate Court. The question which has given us trouble has been whether this really gives the plaintiffs any cause of action and justifies us in ordering an account of that business to be taken. We have come to the conclusion that whichever way the thing is looked at the present claim of the plaintiffs, brought as and when it was, is barred by statute and must be dismissed. It is clear law that the liability of an agent for a specific sum in his hands, such as pecuniary benefit mentioned by S. 88, Trusts Act, or any other money earned or stolen by him in his capacity as agent and which the law makes him liable to pay over to his employer, whether fraud enters into the cause of action or not, is money which could be, in ordinary Common law Courts in England, recovered from the agent as money had and received to the use of the principal. In this view of the case Art. 62, Lim. Act, applies, and the time within which the suit must be brought begins to run from the time when the money is received. This suit was brought on 12th December 1916. There is no evidence that any profit had been derived from this business within three years of that date. It is not always possible to state with mathematical precision the precise scientific definition of an action of this kind. The cause of action arises out of mixed considerations, and we are not prepared to say that it may not come within the definition contained in Art. 90, Lim. Act. It may well be described as a suit by the principal against the agent in respect of either misconduct, or at any rate neglect of his master's interests within the meaning of that article. As a matter of fact most actions of this kind can probably be brought within at least two if not three of the definitions given in the very long schedule to the Statute of Limitation. But this alternative does not assist the plaintiffs, and it is, therefore immaterial whether the view which we prefer, namely, Art. 62, or the view that Art. 90 is applicable, be the correct view. In the case of Art. 90 the plaintiffs would have to sue within three years of the neglect or the misconduct

coming to their knowledge. The notice of dismissal in this case was given on 12th November 1913, more than three years before the institution of the suit. It is admitted by the only representative of the plaintiffs who was called that that notice was largely influenced by the knowledge of this business. The action is also, therefore barred by limitation under that article. The appeal must be allowed and as regards the defendant the suit wholly dismissed here and below with costs including in this Court fees on the higher scale.

Stuart, J.—I have very little to add. I find that none of the instances as established can bring the case within the essential conditions laid down in *Williamson v. Barbour* (1). The re-opening of the account cannot be justified. I should have doubts, even if these instances had been established better than they were, whether they would be of sufficient importance to justify a re-opening of an account which had been closed, in view of the facts that the members of the firm had had every opportunity of ascertaining the accuracy or inaccuracy of the entries, that the accounts had been audited by competent auditors, and that Puran Mal's conduct had not been criticised or made the subject of complaint by any of the persons entrusted with the management until some period after he had severed his connexion with the firm. With regard to the question of limitation in connection with the profits of the Bindraban business, the learned counsel for the respondents has brought to our notice the decision of their Lordships of the Privy Council in *Asghar Ali Khan v. Khurshed Ali Khan* (5) and of a Bench of the High Court of Calcutta in *Shib Chandra Roy v. Chandra Narain Mukerjee* (6). In the Privy Council case their Lordships have found that Art. 89 applied to a suit brought by one brother against another brother in respect of old accounts connected with profits of joint family property. They held that each brother was an agent of the other brother and applying Art. 89 in a suit for account of profits received, they found that money was moveable property within the meaning of the Article. In the second case it was also clear that the amount

had been received by an agent on behalf of his principal, for his principal and in the name of his principal, and adopting the same view that money was moveable property, a Bench of the High Court of Calcutta applied the same Article. But here the case is very different. If Puran Mal had received the profits of the Bindraban business as agent for Messrs. Ford and MacDonald & Co., Ltd., Art. 89 would undoubtedly apply, but here the case is that he was working against the interest of Messrs. Ford and MacDonald & Co., Ltd., and Messrs. Ford and MacDonald & Co., Ltd., in preference to suing him for damages have chosen to claim under the provisions of S. 88, Trusts Act, the profits which he may have made in the business.

I do not see how by any possible reasoning the profits of the Bindraban business could be considered to be moveable property received by Puran Mal on behalf of Messrs. Ford and MacDonald & Co., Ltd. Those profits were not received by Puran Mal for Messrs. Ford and MacDonald's use within the meaning of the word in English law, for they were not received on their account. Therefore it is established that Art. 89 would not apply in this case. It is not of importance whether Art. 62 or Art. 90 applies. One must apply and under either this portion of the suit is barred by limitation. I agree with the decision that the appeal must be allowed and the suit against Puran Mal dismissed with costs.

By the Court.—We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit as against Puran Mal with costs here and below. Costs in this Court will include fees on the higher scale.

V.B./R K.

Appeal allowed.

A. I. R. 1919 Allahabad 445

KNOX, AG. C. J. AND PIGGOTT, J.
Garib and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 368 of 1919, Decided on 30th May 1919, against order of Sess. Judge, Basti.

Penal Code (45 of 1860), Ss. 300, 302 and 304—Two accused under grudge causing death by brutal assault on defenceless man are guilty of murder.

The accused, two in number, who were incensed against the deceased, committed a brutal assault

(5) [1902] 24 All. 27=23 I A. 227=8 Sar. 142 (P. C.).

(6) [1905] 32 Cal. 719.

upon the latter who was defenceless and unarmed and caused his death:

Held: that the accused were guilty of murder.
[P 447 C 1]

Judgment.—Sheoharakh Kurmi, resident of Kebra, aged 25, and Gharib Kurmi, resident of the same village, aged 40, were placed on their trial before the Sessions Court of Basti on a charge framed under S. 304, I. P. C. The learned Sessions Judge before trial charged the accused under S. 302, I. P. C. and called upon the accused to plead to the amended charge. The accused pleaded not guilty to the charge. The learned Sessions Judge has gone very carefully into the evidence before him and has delivered what may be called a very well-balanced judgment. The evidence before the learned Judge was so far believed both by him and the Assessors that they came unhesitatingly to the conclusion that the accused, who are now appealing, were partakers in the assault upon Ram Baran. The Assessors give it as their opinion that they were sure that the accused took part in the affray and beat Ram Baran, the accused did not intend to kill Ram Baran, and therefore, they did not commit murder. The learned Judge in summing up the case in his judgment writes as follows:

"I am prepared to find, upon the evidence as adduced before me in the present trial, without the least hesitation or doubt that the accused and those who have been convicted in the previous trial attacked Ram Baran; that they were already suffering from keen disappointment on his previous conduct; that his very sight at the time of the occurrence in question made them furious beyond limit; that the aggressors had also come determined to rescue their cattle in spite of all opposition and at any cost; and that prone to commit acts of violence in the above mental state, they brutally beat the deceased who was at the time without means of defence and totally helpless, the whole affair being altogether one sided in aggressiveness as well as cruelty."

In order to understand the above remarks it is necessary to remember that two other persons who according to the evidence joined in this assault upon Ram Baran, were tried by a Judge who preceded the present Judge as Sessions Judge of Basti. They had been committed to his Court charged with an offence under S. 304, I. P. C. They were found guilty of the offence with which they were charged and sentenced to rigorous imprisonment for seven years each. They appealed to this Court and this Court dismissed the appeal.

The accused in this case have been

defended by a very learned counsel of this Court, who took as his line of argument that either the evidence now on record was the same as that which had been recorded in the previous case and the conviction upheld was conviction for an offence under S. 304, I. P. C., or that the evidence had been so altered as to make the case now put before the Court amount to a case of wilful murder. We are not referred to any difference in the evidence then given and the evidence now given. The evidence shows, so far as the present accused are concerned, that the two accused either themselves, or with others joining them, committed an assault upon a man who was defenceless and unarmed. The nature of the assault can at once be seen from the medical evidence. The officer who conducted the post mortem found four marks on the body of the deceased and on removing the skull-cap a firm and thick piece of clotted blood was found pressing on the brain from the left temporal region to the left side of the brain above durameter. The brain was found quite pressed on the side where it was struck and the fracture continued to the petrous portion of the left temporal bone and on the middle part of the base of the brain. He gave it as his opinion that the deceased died from compression of brain as the result of the fracture of the skull, which was probably caused by some blunt weapon, probably a lathi. The person or persons who committed this act must have known that it was so eminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death.

It was open to the accused (now appellants) to show that this act of theirs was not murder but came under one of the provisos to S. 300, I. P. C. They made no attempt to do this. On the contrary, they said that they were not guilty of murder, and that they were not present when the murder was committed. This being so, the learned Sessions Judge was very right in finding the appellants guilty of wilful murder, and it is well that there should be Sessions Judges who in the present day are able to take this right and proper view of the law. In many cases it has come within our experience that the tendency has been the other way and so far as the present case

is concerned, we are unable to alter either the conviction or the sentence passed by the learned Sessions Judge.

But the case is undoubtedly open to this anomaly that out of four persons, who so far as we can gather from the evidence committed or took part in the same act, two have been sentenced, as in the present case, to transportation for life and two have been sentenced to rigorous imprisonment for seven years each. The case might well be brought before the Local Government who, if they consider it proper, can take action and remove the inequalities in sentence which have taken place.

The appeals are dismissed. The case will be entered in the record of the Sessions Judge as having been very properly and carefully decided.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 447 (1)

KNOX, AG. C. J. AND BANERJI, J.

Rampat Rai—Plaintiff—Appellant.

v.

Harihar Rai and *another*—Defendants—Respondents.

Letters Patent Appeal No. 129 of 1917, Decided on 20th May 1919, against a judgment of Rafique, J.

Civil P. C. (1908), S. 102—Small Cause Suit—Value less than Rs. 500—Second appeal does not lie—Letters Patent (All.), Cl. 10.

Where a single Judge of the High Court entertains and decides a second appeal in a suit of the nature of a small cause of value less than Rs. 500, the decree passed by him is without jurisdiction and is liable to be set aside on a Letters Patent appeal. [P 447 C 1]

Narbadeshwar Prasad Upadhyay—for Appellant.

Uma Shankar Bajpai and *Peary Lal Banerji*—for Respondents.

Judgment.—The subject-matter of the suit to which this Letters Patent appeal relates was clearly a Small Cause Court suit. The amount claimed was below Rs. 500; no second appeal lay. The learned Judge who decided the appeal had no jurisdiction to hear it and no jurisdiction to pass the decree. The appeal is decreed. The decree of this Court is set aside and that of the lower appellate Court restored. We make no order as to costs.

V.B./R.K. *Appeal decreed.*

A. I. R. 1919 Allahabad 447 (2)

RICHARDS, C. J. AND BANERJI, J.

Sheo Shankar Lal—Judgment-debtor—Appellant.

v.

Radhe Shiam—Decree-holder—Respondent.

Execution Second Appeal No. 888 of 1918, Decided on 4th March 1919, against decree of Dist. Judge, Allahabad, D/- 4th April 1918.

Limitation Act (1908), Art. 182 (5)—Application for time is step-in-aid.

An application by a decree-holder during the course of execution proceedings for time to ascertain the address of a judgment-debtor is a step-in-aid of execution. [P 448 C 1]

Lakshmi Narain for *Chadha*—for Appellant.

Ibn-i-Ahmed—for Respondents (was not called upon.)

Facts.—On 28th February 1913 the People's Industrial Bank instituted a suit against four persons and obtained a decree against them. The Bank put the decree in execution on 28th March 1913. On 4th December 1913 the Bank transferred the decree to the present respondent, B. Radhe Shiam. The transferee applied on 3rd February 1914 to have his name substituted as decree-holder and also prayed for attachment and sale of certain property belonging to one of the judgment-debtors, B. Sheo Shankar Lal, only. Notices were issued to all the judgment-debtors and B. Radhe Shiam's name was substituted on 27th June 1914. Two of the notices having returned unserved the execution Court ordered the decree-holder on 18th August 1914 to take proper steps by 25th August 1914. On 25th August 1914 the Court was closed. On 26th August 1914 the decree-holder applied for time in writing to ascertain their addresses and the Court on that date rejected his prayer and his application was struck off. His next application for execution was dated 25th July 1917. It was dismissed by the execution Court as barred by time. In appeal the learned District Judge held that the application for time dated 26th August 1914 saved limitation and that the application of 26th July 1917 was consequently not time barred. He said: "The application, dated 26th August 1914, was one for a postponement in order to ascertain the addresses of two judgment-debtors. That applications for time are steps-in-aid of execution was decided very clearly in *Pitan*

Singh v. Tota Singh (1). The same presumption must be made in this case as was made in *Pitam Singh's* case (1) that the decree-holder wished to ascertain the addresses of these judgment-debtors in order to take some steps in execution. Secondly, there is on the order-sheet an order by the Court dated 18th August 1914 directing the decree-holder to take steps by 25th August 1914 to serve the remaining judgment-debtors, so the decree-holder is relieved from the responsibility on the question whether there was any occasion to take this step or not. Thirdly, in Art. 182, Cl. 5, Limitation Act, the word necessary does not appear."

The judgment-debtors thereupon appealed to the High Court.

Judgment.—We think that the view taken by the Court below was correct under the circumstances of this case. We dismiss the appeal with costs including in this court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

(1) [1907] 29 All. 301.

A. I. R. 1919 Allahabad 448

RICHARDS, C. J. AND BANERJI, J.
Narain Das—Defendant—Appellant.

v.

Dilawar and others—Plaintiffs—Respondents.

Second Appeal No. 262 of 1917, Decided on 7th December 1918, against decree of District Judge, Meerut, D/- 21st December 1916.

(a) Evidence Act (1872), S. 71—Mortgage—Execution proved according to S. 71—Execution on face of deed in presence of more than one person—Mortgage is good.

Where the execution of a mortgage has been proved in the manner prescribed by S. 71 and on the face of it appears to have been executed in the presence of more persons than one it is a good mortgage. [P 448 C 1]

(b) Deed—Consideration—Recital in, as to consideration—Value of.

The recital in a mortgage deed of the receipt of consideration is good prima facie evidence against an auction purchaser just as it would be evidence against a purchase by private treaty. [P 448 C 2]

Kailas Nath Katju—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—We think that the view taken by the Court below was correct. In the first place we consider that under the circumstances the mortgage of 1903 was proved. We think that execution of the mortgage having been proved in the manner prescribed by S. 71, Evidence Act, and on the face of it, it appearing to have been executed in the presence of more than one person it was a good mortgage. The next contention was that the mortgage being a usufructuary mortgage in form the plaintiff could not recover the

money. The mortgage was in a peculiar form and combined a simple mortgage with a usufructuary mortgage. As a matter of fact when the mortgage was made, possession could not be delivered because possession was already in the hands of a prior mortgagee, who is the appellant here, and was the contesting defendant in the Court below. Furthermore the mortgagee himself purchased the equity of redemption and remained in possession keeping the plaintiff out of possession. With regard to the consideration for the second mortgage we think the Court of first instance was wrong in holding that the recital in the bond was not evidence against Narain Das (we assume that this is what he meant). It is clear that if the acknowledgment in the bond was admissible against Narain Das, it was prima facie evidence against him and even if it stood alone cast the onus upon the defendant of showing that the consideration failed in whole or in part. This was expressly decided in the case of *Babu v. Sita Ram* (1). That case was an appeal under the Letters Patent from the decree of a learned Judge of this Court who held that the acknowledgment in the mortgage was good prima facie evidence and a Bench of two Judges were unanimous in holding that the decision of the single Judge was correct. Furthermore on the question as to whether or not the acknowledgment in the bond was admissible against the purchaser from the mortgagor we have the decision of the late Stanley, C. J., and one of us: the case *Nawal Kumar v. Bakhtawar Singh* (2). We think that the acknowledgment is evidence against the auction-purchaser just as it would be evidence against a purchaser by private treaty. Of course it is possible that in different cases the value of the acknowledgment as evidence may vary and possibly it may be more weighty against a purchaser by private contract than against an auction-purchaser, but it is clearly evidence against both. The appeal fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1914 All. 319=25 I. C. 426=36 All. 478

(2) [1912] 17 I. C. 644.

A. I. R. 1919 Allahabad 449

BANERJI AND WALLACH, JJ.

Mahabir Prasad and another—Plaintiffs—Appellants.

v.

Basant Lal and others—Defendants—Respondents.

Second Appeal No. 918 of 1917, Decided on 18th July 1919, from decree of Addl. Judge, Moradabad.

Mortgage—Sale by mortgagee of his rights—Consideration, part of, unpaid—Mutation still in vendor's name—Decree by Revenue Court for profits in vendor's favour—Suit by mortgagor for declaring decree unlawful is not maintainable.

A mortgagee of certain land sold his rights therein but did not deliver possession to the vendee as some of the purchase-money remained unpaid. The mortgagor obtained a decree for redemption against the vendee. The mortgagee however, who had not caused mutation of names to be made in the revenue papers, brought a suit for profits of the land and obtained and realized the decree. The mortgagor then brought a suit for a declaration that the mortgagee obtained the decree for profits unlawfully and for damages.

Held: that the suit was not maintainable as the mortgagee not having delivered possession to the vendee and his name being borne on the revenue registers was entitled to the decree for profits. [P 450 C 1]

M. L. Agarwala—for Appellants.*Haribans Sahai*—for Respondents.

Judgment.—The learned Judge of the lower appellate Court has not correctly conceived the facts of the case, but we have gone into those facts and are of opinion that the plaintiff's suit was rightly dismissed by the Court of first instance and the lower appellate Court's decree was a right decree. The facts which are somewhat complicated are these: In 1875 a nineteen biswa share in Mauza Hatampur was mortgaged by one Haider Baksh to four persons, namely, Har Sarup, Kishen Lal, Chiranji Lal and Shambu Nath. The defendant Basant Lal is the son of Har Sarup. The plaintiffs, Mahabir Prasad and Hira Lal, purchased the rights of some of the representatives of the mortgagor from those persons. Basant Lal transferred some of his rights to his wife, Mt. Rupdei, defendant 2 and both of them on 6th September 1907 executed a sale deed in respect of a portion of the nineteen biswas in favour of Kishori Lal and Sundar Lal, defendants. Part of the consideration for the sale was left with the vendees for payment to the creditors of the vendors. Payment not having

been made to the creditors and the creditors having realized their money from Basant Lal, he and his wife brought a suit in 1911 against Kishori Lal and Sunder Lal for unpaid purchase money and damages and obtained a decree for the unpaid purchase money on 23rd June 1911.

The decree so obtained was discharged on 22nd February 1913. On 15th August 1915 the present plaintiffs made a deposit under S. 83, T. P. Act, of a sum of money which they alleged to be due under the mortgage and to be payable to Basant Lal and his wife and the two purchasers from them. There was some dispute as to which of these defendants was entitled to the money deposited and the Court therefore refused to make any payment. Thereupon the plaintiffs withdrew the money from the Court and subsequently brought a suit for redemption of the mortgage and obtained a decree against Kishori Lal and Sunder Lal. They had made Basant Lal and Mt. Rupdei defendants to the redemption suit but withdrew it as against them and the suit was dismissed as against those two persons. It appears that of the two plaintiffs, plaintiff 1 Mahabir Prasad, is also lambardar of the village. Basant Lal and Rupdei, whose names continued to be recorded in the revenue papers and who had not caused mutation of names to be effected in favour of their vendees by reason of a portion of the consideration for the sale not having been paid, brought suits for profits against Mahabir Prasad as lambardar for the years 1319 and 1320 Fasli. They obtained decrees against him and it is stated that they realized the amounts of the decrees for profits. After this the present suit was instituted and the prayer in the plaint was as follows:

"It may be declared that defendants 1 and 2 obtained the decrees, dated 18th January 1913 and 12th October 1915, for profits of 1319 Fasli and 1320 Fasli without any right and recovered the amounts of the decrees for the profits of the afore-said years from the plaintiffs unlawfully and Rs. 790, principal and interest, as damages and costs of the suit and pendente lite and future interest may be awarded to the plaintiffs against defendants 1 and 2 or such defendant as may be found responsible for it."

The main ground of the plaintiff's claim was that as they had deposited the mortgage money on 15th August 1911 they were entitled to the profits for which the decrees obtained by defendants 1 and 2

from the Revenue Court were passed. Incidentally in the plaint they stated that those defendants had sold their interests in the mortgaged property to the other two defendants but it seems that the real ground of their claim was that they deposited the mortgage money and were therefore entitled to the profits for the two years mentioned above. This claim was dismissed by the Court of first instance and the decree of that Court was affirmed by the lower appellate Court. We think that on the ground upon which the suit was brought the claim could not be supported. During the years in question the mortgage had not been redeemed as against defendants 1 and 2. They had not delivered possession to their vendees by reason of the latter not having paid the whole of the purchase-money. Their names were recorded in the revenue papers in the years 1319 and 1320 Fasli, and therefore they were entitled to profits for those years. The learned counsel for the appellant has ingeniously argued that the suit must be deemed to be a suit under S. 201 (3), Agra Tenancy Act. We do not agree with this contention, firstly, because the suit has not been brought solely by the defeated defendant in the suits for profits, and secondly because this is not a suit for a declaration that the plaintiffs had no interest in the property during the years for which they claimed profits. The real claim in the present case is to get back the money which the plaintiffs have paid under the decrees for profits. The decrees when passed were right decrees in view of the fact that the names of defendants 1 and 2 were recorded in the revenue papers in the years 1319 and 1320 Fasli and they were therefore entitled to claim profits for those years. It is admitted that subsequently to the passing of the decree for redemption the names of defendants 1 and 2 have been removed from the revenue record, but during the years in question their names were borne on those records and the decrees for profits were therefore properly passed in their favour. The suit as brought was not in our opinion maintainable and was rightly dismissed. We dismiss the appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1919 Allahabad 450**

PIGGOTT AND WALSH, JJ.

Pahladi Lal—Plaintiff—Appellant.

v.

Mt. Laraiti and others—Defendant—Respondents.

First Appeal No. 91 of 1916, Decided on 10th June 1918, from decree of Sub-Judge., Budaun.

Registration Act (1908), S. 28—Mortgage deed — Property not belonging to mortgagor included in deed—Registration in district in which such property is situate is not invalid in absence of collusion.

Where property which is admitted to be in existence but which does not belong to the mortgagor is included in a mortgage deed, the fact that the document is registered in the district in which that property is situate, and that that property is the only property hypothecated within the registration district, is not sufficient, in the absence of any collusion between the parties or of knowledge on the part of the mortgagee, to invalidate the registration of the deed. [P 451 C 1]

B. E. O. Conor and Iqbal Ahmad—for Appellant.

Tej Bahadur Sapru and Gulzari Lal—for Respondents.

Judgment.—We have come to the conclusion that this appeal must be allowed and the suit sent back for re-trial. The suit is brought upon two simple mortgage bonds by the plaintiff against the widow of one Bijai Singh. Bijai Singh borrowed two sums, one of Rs. 6,000 and the other of Rs. 1,000, in the month of August 1902 and by two documents, executed respectively on 26th and 27th August, hypothecated in respect of those loans certain property set out in the schedule to the bonds. He was in urgent need of money on 29th or 30th August for the purpose of lodging it in Court in respect of a decree which he had obtained in a pre-emption suit. He had been a member of a joint Hindu family who had partitioned their property by means of an award in the year 1896. That award was carried out by a decree in the same year. The father, Sher Singh, had died in 1897. By the award the property was partitioned between his four sons, Bijai Singh, the mortgagor in question, Niranjani Singh, his brother who is still living, Shib Singh, a brother who is dead, and Dirgpal Singh who is still living and who was at that time a minor. The property hypothecated by Bijai Singh in these two documents in substance consisted of the property which he was awarded under that partition, although it is not clear that it did not include some

other property as well, and also included 2½ biswas in a certain mauza named Kachaura which had in fact been awarded in the decree to the minor Dirgpal Singh. Prima facie it would therefore appear to be established, at any rate for the purpose of our decision today, that Bijai Singh had no title to this property and could not hypothecate it to the plaintiff.

It is this which has given rise to all the difficulty in the case. If this property had not been included in the bonds, the registration office at Budaun would not have been the proper place under the Registration Act for the registration of the bonds. If, on the other hand, this property was included, then Budaun was the proper place for the registration of the bonds which were in fact registered at Budaun. The learned Subordinate Judge has dismissed the suit on the ground that the registration was invalid, purporting to follow the decision of the Privy Council in *Harendra Lal Roy Chowdhuri v. Srimati Haridasi Debi* (1): we say "purporting to follow that decision" because it is difficult to say what exactly the learned Subordinate Judge meant to find as a question of fact in his judgment. The question which we have to decide as a matter of law is this: whether, when property is admitted to be in existence and has been included in a mortgage deed, but is shown not to have been the property of the mortgagor, the fact that the document has been registered in the district to which that property belongs is sufficient to invalidate the registration when that property is the only property hypothecated within the registration district. A priori on reading S. 28, Registration Act 16 of 1908, there would appear to be no ground for this contention. The section provides that "the document shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate." Whether or not the mortgagor had a good title to this piece of property, does not affect the question whether this property is situated in the district where registration took place and whether the document relates to it. It would be a strange result if it were the law that upon proof that the mortgagee had obtained no title to a small portion of property on account of which the place of registration was

selected, that he should lose not only the benefit of his security over that small portion but the entire benefit of the hypothecated property, particularly when, as might happen in many cases, he had been deceived by the mortgagor. This is the view which has been taken by a two Judge Bench in Calcutta in the case of *Broja Gopal v. Abinash Chandra* (2), which is not reported in any authorized report, but which is to be found in 14 C. W. N. 532.

We think that decision might be reported in the authorized reports. The Judges refer to a decision of the Privy Council many years ago, in which it was held that a small portion of the property covered by the deed was sufficient to give the Sub-Registrar jurisdiction in whose sub-district that portion was situate. We agree with the decision of the Calcutta Bench and it therefore becomes a question of fact, and it is really a question of fact, in every case whether, as the Privy Council says in its judgment in *Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi* (1), the parties have intentionally by a mutual collusive arrangement inserted in the deed property either which does not in fact exist or which, while in existence, is not intended by either of them to be a part of the security. Where the parties are colluding for the express purpose of evading the registration law, in such case, applying the Privy Council decision to the section, the result would be that the deed in question does not relate to the property, inasmuch as neither party had any intention of dealing with the property. On the other hand, where the real fact is that the parties intended to deal with the property, the condition of the mortgagor's title does not affect the question of registration. Applying these principles, which we think are clear and well settled the question which we have to determine in this case is whether it is proved that the mortgagee was aware of the defect in the mortgagor's title and expressly consented to the inclusion of this property in the deed for the purpose merely of complying with the Registration law. In our view nothing short of a finding to that extent would be sufficient and the finding, if arrived at, must be supported by clear evidence. It is suggested in this case that there is in the first place evi-

(1) A. I. R. 1914 P. C. 67=41 Cal. 972=23 I. C. 637=41 I. A. 110 (P. C.).

(2) [1910] 5 I. C. 127.

dence of the fact. That is undoubtedly true; but the evidence on this point is far from satisfactory. On the one hand, the plaintiff did not go into the box and has exposed himself to just criticisms on that account; but it is difficult to see what more he could have said than the documents which were presented on behalf of Bijai Singh, unless he was prepared to admit what the defendants allege. Now the documents, the khewat and the revenue records, generally were such as to justify the acceptance, by any purchaser or mortgagee, of Bijai Singh's title to this piece of property.

For reasons of their own, possibly not unconnected with a scheme of this kind, the family had deliberately entered Bijai Singh's name as being in possession of this property, although it had been awarded to his minor brother. A witness named Sham Lal was called on behalf of the plaintiff. He deposed that Bijai Singh came to the house of the plaintiff with his brother Niranjan Singh and when asked with reference to this property referred the plaintiff to the khewat, and that the plaintiff saw the khewat and next day asked his servant Pandit Guman Lal to inspect the registers of the Registration Office. That evidence, although not supported by the testimony of the plaintiff himself, might have been contradicted by Niranjan Singh and was not. A pleader, who has been practising since 1880 and has acted for the defendants for many years and is now indebted to them in an amount of Rs. 800 or Rs. 900, was called by the defendants although he had been summoned by the plaintiff, and it is upon his evidence and his evidence alone that it is suggested that it is proved that the plaintiff knew quite well that this was a fictitious entry in the deed. He attested both the documents and identified Bijai Singh at the time of the registration. He knew the actual ownership of the property perfectly well and was under the impression, according to him, that this fictitious inclusion of the minor's property in the deed was done to avoid the journey to Dataganj, where registration would otherwise have taken place, and to enable Bijai Singh to borrow money for the satisfaction of the pre-emption decree. Whatever the profession may have thought before the Privy Council decision we are of

opinion that an act of this kind on the part of a professional gentleman who is said to be a gentleman of respectability was highly questionable. However that may be, we have to consider whether his evidence really proves anything against the plaintiff. He says that all of them, including himself, Bijai Singh and the plaintiff, knew that the property did not belong to Bijai Singh. We do not think that this is evidence that the plaintiff knew.

It is merely an expression of opinion on the part of the witness. He does not tell us how the plaintiff is supposed to have known or how he came to know that the plaintiff knew. Nothing would have been easier, if there was any substance in the allegation, than for the witness to have stated in unequivocal terms to the Court how the plaintiff became acquainted with the true state of the facts. In the presence of the document which absolutely contradicted the witness, we think there was no evidence that the plaintiff knew, and therefore no evidence that he was a conscious party to the fictitious entry in the deed. Inasmuch as it was admitted that the property was in existence and was supposed to be in the possession of the mortgagor, the onus was on the defendants to show that both parties intended the entry to be fictitious. We do not think the Court below really found that the plaintiff knew. It was prepared to accept the pleader's evidence but it does not expressly find any knowledge at all on the part of the plaintiff. On the other hand, it is said in the judgment that the question is whether the plaintiff should not have made more careful inquiries at the time. This question would be quite irrelevant if the Court below held that the plaintiff knew the real truth. It appears to us that the decision has gone against the plaintiff merely on the finding that the plaintiff ought to have known under all the circumstances that Bijai Singh had no power to transfer Mauza Kachaura and that therefore he was not acting in good faith. This is not sufficient. The appeal must be allowed with costs and the case remanded to the Court below to be tried out on the merits.

V.B.P.K.

Case remanded.

A. I. R. 1919 Allahabad 453

PIGGOTT AND WALSH, JJ.

Radhey Shiam—Plaintiff—Appellant.
v.*Bihari Lal*—Defendant—Respondent.

First Appeal No. 288 of 1915, Decided on 11th April 1918, from decree of Sub-Judge, Allahabad, D/- 30th September 1915.

(a) Contract Act (9 of 1872), S. 65—Contract by minor—Mortgage—Fraudulent representation, absence of—Minor, is not liable to repay money borrowed.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud. [P 453 C 2]

In a suit for sale on a mortgage bond, the defendant pleaded that at the time of the execution of the bond he was a minor and no fraudulent representation on the part of the defendant inducing the plaintiff to enter into a contract was either alleged or found :

Held : that the defendant was not liable to repay the money borrowed by him. [P 455 C 1]**(b) Civil P. C. (1908), S. 35—Discretion not properly exercised—Appellate Court can make proper order.**

Where a trial Judge has given his reasons for depriving a successful party of costs and all the circumstances are before the Court of appeal, the latter can, if satisfied that the trial Judge has not exercised his discretion judicially, interfere with it and make the order which the lower Court ought to have made. [P 454 C 2]

The mere fact that a defendant relies upon a right which a statute gives him is not a sufficient ground for depriving him of his costs.

[P 455 C 1]

Tej Bahadur Sapru, B. E. O'Connor and Sital Prasad Ghosh—for Appellant.*Gokul Prasad and Radha Kant Malaviya*—for Respondent.**Judgment.**—This is an appeal from a decree dismissing a suit in effect by two judgments, dated respectively 13th September 1915 and 30th September 1915, on what were really two preliminary points. The suit was brought upon a mortgage deed for sale of the property hypothecated in respect of a default made by the defendant at an early stage of the transaction. The plaintiff chose to shelter himself behind the legal arguments of counsel and did not go into the box, and at present there is nothing before us to show why and how the defendant was persuaded in January 1915 to enter into a fresh transaction at compound interest with security in order to get rid of some comparatively recent unsecured liabilities which are not even shown to have borne compound interest. We do not know either whether the defendant ever received a single rupee in respect of this

transaction. The uncontradicted evidence of the defendant is that he did not, and the general conduct of the plaintiff raises some inference that he has not paid a rupee more than he was obliged to pay.

Two grounds are raised in appeal against the judgments which I have mentioned : each deals really with a separate judgment. By the fourth ground of appeal it is contended that the defendant, as to whom it has been found that he was a minor, is estopped by his fraudulent misrepresentation from relying upon this defence. This is the latter of the two judgments to which I have referred. The law is well settled and this point has been disposed of by the learned Subordinate Judge in an excellent judgment, in which he relies very largely upon the recent decision of the English Court of appeal in a considered judgment of three Lord Justices in *Leslie Ltd. v. Shiell* (1). That decision, by the way, has been recently approved by the Privy Council : see *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (2), in a case which was cited to us for another purpose. The learned Judge of the Court below cites a passage from the judgment of Lawrence, J., who was then sitting in the Court of appeal, to the following effect :

"Wherever the infant requires, as a plaintiff, the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud, he will be made to restore it to its former owner."

So far Lawrence, J., has given expression to the equitable principle recognized in England and adopted in the case relied upon by Dr. Sapru, *Jagar Nath Singh v. Lalta Prasad* (3):

"But," continues Lawrence, J., "I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud."

And that was in substance the decision of the Court of appeal which has been consistently followed by the Courts in India. The contention as to the legal proposition therefore fails and we agree with the judgment of the Court below on this point. We desire however to add, lest it should be supposed that this decision conveys any reflection upon the de-

(1) [1914] 2 K. B. 607=83 L. J. K. B. 1145.

(2) A. I. R. 1916 P. C. 242=39 I. C. 401=43 I. A. 256 (P.C.).

(3) [1909] 31 All. 21=1 I. C. 562.

fendant, that not only has no fraudulent representation been found against the defendant, but it has not even been alleged. There is a faint suggestion in para. (c) of the reply which the plaintiff made to the written statement where the defendant set up his minority at p. 9 of the printed book, which suggests that the defendant put forward some active misrepresentation with regard to his age in the form of a document. It is not alleged that that was done fraudulently, and applying the principle which has always been applied by Courts of justice in a case of this kind, this point really ought not to have been allowed to have been argued by the plaintiff at all.

The plaintiff, as we have said, was not called and there is no suggestion from first to last by any positive evidence of any active misrepresentation by the defendant before the contract was entered into. Further than that it would be necessary for the plaintiff to establish that he was induced by such misrepresentation, if in fact it had been made. One's experience of these cases in Courts is that the plaintiffs who carry on money-lending business, like the present plaintiff in this case, and enter into similar transactions, are not as a rule so much influenced by the statements of their respective debtors as by the desire to get inexperienced young men into their clutches and to make as much profit out of them as the law will permit, or as the fear of criminal charges, or other consequences of that kind may prevent the debtors from resisting. As we have already said, we are inclined to think that the plaintiff himself entertained grave doubts as to the age of the defendant and therefore it is unlikely that he was influenced by anything the defendant had said to him. So much for the first point raised in the fourth ground of appeal which is dealt with in the latter of the two judgments.

With regard to the other point, namely, the judgment of 13th September 1915, on the pure question of fact as to the actual age of the defendant one really cannot improve upon the able and careful analysis of the evidence contained in the judgment itself. Out of respect to the arguments addressed to us however we will add this. It seems to us that the evidence with regard to the defendant's actual age is overwhelming. The best evidence of course is the evidence of a

minor's parents. In this case the mother was dead, but it so happened that she made an application in 1900 with reference to her child who, if the rest of the evidence be believed, had been born only three years before. It is almost impossible that she could have been mistaken at that time, and no reason of any kind is suggested why she should have desired to mislead anybody. The sister, who was a pardanashin lady and called on commission, gave strong and clear evidence which we have no reason to suppose to be dishonest and which was not shaken by a long and determined cross-examination. The brother's evidence is much to the same effect. In the result the family evidence in this case is peculiarly strong and clear. It is therefore unnecessary to say anything about the weight or admissibility of horoscopes and other matters of that kind which have been much discussed. As against such evidence as exists in this case expert evidence, horoscopes and medical certificates are of very little, if any, value. In this case they are, in our opinion, of no value whatever. The appeal fails on both grounds and must be dismissed with costs.

The matter however does not rest there. There is a cross-objection by the defendant upon the ground that he has been deprived of his costs. We agree with Dr Sapru in his contention upon this point that this is a matter for the discretion of the trial Court. At one time it was thought that a Court of appeal would never interfere with the exercise of such discretion, but where the Judge has given his reasons and all the circumstances are before the Court of appeal it is now settled that the Court of appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the Court below ought to have made. We think that there was really no evidence to support a finding that the defendant was "mostly responsible for this litigation." The presumption usually is that a plaintiff is responsible for a suit which he has brought into Court.

In this case the plaintiff was in a peculiar hurry to bring the case into the Court. We cannot agree with the ground upon which the learned Subordinate Judge has proceeded. It has been held in the English Courts of appeal that the

mere fact that a defendant relies upon a right which a statute gives him is not a sufficient ground for depriving him of his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a statute of Limitation, or the Gaming Act or a defence of infancy, but it has been distinctly held that neither of those grounds is a judicial ground for depriving the defendant of his costs. In the case which was relied upon by the appellant and was referred to in argument *Leslie Limited v. Shiell* (1), the defendant was deprived of his costs even of that part of the suit in which he succeeded. He had been found guilty by a jury of fraudulently deceiving the money-lender. There is nothing of that kind in this case. The plaintiff has chosen to come into Court with a hopeless case. The defendant has succeeded in establishing a legal defence. We see no reason why the costs should not follow the result. The appeal is dismissed with costs and the cross-objections are allowed. We modify the decree of the Court below by allowing the defendant his costs throughout.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1919 Allahabad 455

BANERJI, J.

Sheo Sampat Pande—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 110 of 1918, Decided on 22nd May 1918, from an order of Sess. Judge, Gorakhpur.

Criminal P. C. (1898), Ss. 195 and 476—Decree holder realizing sum larger than due—Application by judgment-debtor for sanction to prosecute—Presiding officer stating facts in letter to Magistrate of district and soliciting orders—Subdivisional officer through whom letter was submitted, ordering prosecution, trying and convicting decree-holder—Letter addressed to District Magistrate held not complaint—Trial in absence of sanction and complaint held illegal.

Accused who held a decree against the complainant, recovered in execution of the decree a sum larger than was due thereunder. The complainant thereupon applied to the Court for sanction to prosecute the accused. No sanction was granted, nor was any action taken under S. 476. The presiding officer of the Court however addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. The subdivisional officer through whom the letter was submitted, instead of sending it on to the District Magistrate himself ordered the prosecution of the accused and tried and convicted him under Ss. 193 and 210, Penal Code:

Held: (1) that the letter addressed to the District Magistrate did not amount to a complaint within the meaning of S. 476; (2) that no sanction having been granted under S. 195 and there being no complaint under S. 476 of the Code, the trial and conviction of the accused were illegal.

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Peary Lal Banerjee and *N. P. Upadhyaya*—for Applicant.

R. Malcomson—for the Crown.

Judgment—The applicant Sheo Sampat, who is an old man of seventy has been convicted under Ss. 193 and 210, I. P. C., under the following circumstances: Sheo Shampat brought a suit in the Revenue Court against one Barbu for arrears of rent. He claimed Rs. 16-11-0 as principal and interest; an ex-parte decree was passed in his favour on 29th September 1916 for Rs. 9-4-0 and Rs. 2-5-0 costs; total Rs. 11-9-0. The judgment-debtor Barbu made an application to have the ex parte decree set aside. This application was granted. The case was reheard and on 24th May 1917 a decree was made for Rs. 8-3-0 which included costs. On 19th May 1917, Sheo Sampat filed an application for execution of the decree. In that application the date of the decree was erroneously mentioned as 20th June 1917 and the amount claimed was put down as Rs. 16-11-0. He took out attachment of some property of the judgment-debtor. Meanwhile the judgment-debtor deposited the full amount of the decree. In pursuance of the order of attachment of the property of the judgment-debtor some bullocks were attached by the Amin. The judgment-debtor paid the Amin Rs. 17-5-6 which was the amount mentioned in the warrant of attachment and this amount was received by Sheo Sampat who granted to the judgment-debtor a receipt in full for the aforesaid sum of Rs. 17-5-6. Subsequently he filed an application in the Court which was executing the decree, stating that he had made a mistake and that the amount due to him was only Rs. 8-3-0 and no more. Three days before the date of that application the judgment-debtor had applied to the Court to sanction the prosecution of Sheo Sampat. No sanction was granted. The Assistant Collector of the Second Class, who was the Tahsildar in whose Court the execution proceedings were held, did not take action under S. 476, Criminal P. C. but on 6th October 1917 he addressed to the Magistrate of the district a letter in which he stated

